

***United States Court of Appeals  
for the Second Circuit***



**APPENDIX**





UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

ORIGINAL

**75-7439**

NATIONAL STARCH & CHEMICAL CORPORATION,

Plaintiff-Appellee,

-against-

SS HERMIONE, her engines, boilers, etc.,  
APOLLO SHIPPING CO.,

Defendants,

-and-

AMBER MARITIME CORP.,

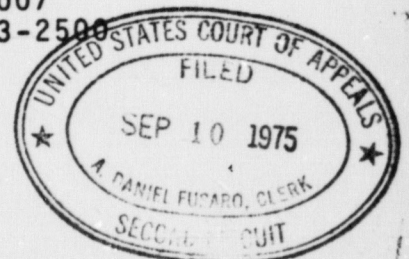
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES  
DISTRICT COURT FOR THE SOUTHERN  
DISTRICT OF NEW YORK

APPELLANTS' APPENDIX

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[ COVER PAGE 1 ]



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DOCKET ENTRIES

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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NATIONAL STARCH & CHEMICAL CORPORATION,

Plaintiff-Appellee,

-against-

SS HERMIONE, her engines, boilers, etc.,  
APOLLO SHIPPING CO.,

Defendants,

-and-

AMBER MARITIME CORP.,

Defendant-Appellant.

---

DATE

PROCEEDINGS

Nov. 13-73	Filed Complaint and Issued Summons
Dec. 4-73	Filed Summons with Marshal's Return Served Amber Maritime Corp by William Hepburn, Oper. Mgr. auth to accept on 11/29/73
Dec. 13-73	Filed ANSWER of Deft. Amber Maritime Corp.
Dec. 13-73	Filed Pltff's Notice of Examination before trial ret. 1/18/73.
Jan. 2-74	Filed Interrogs propounded to Pltff by Deft. Amber Maritime Corp.
Feb. 1-74	PRE-TRIAL CONFERENCE HELD BY Judge Tyler



DATEPROCEEDINGS

Jan. 31-74	Filed Pltff's Answer to Interrogs.	
Feb. 1-74	Filed Notice of Change of Firm Name for Atty for Pltff.	
Apr. 15-74 & Apr. 26-74	PRE-TRIAL CONFERENCE HELD BY Tyler, J.	
May 24-74	Filed Pltff's Notice of Motion to transfer & Consolidate pursuant to 28 USC, Sec. 1404(a) & FRCP, Rule 42(a) ret. 6/17/74.	
May 29-74	Filed Notice of reassignment to Judge Weinfeld.	m/n
May 30-74	Filed Deft. Amber Maritime affdt. of Arthur Boal in opposition to motion to transfer	
Jun. 20-74	Filed stip. and order that the motion by pltf. for consolidation and transfer to the EDNY is adj. to June 25, 1974. So ordered, Weinfeld, J.	
Jun. 21-74	Filed pltf's reply affdt. of Marton B. Mulroy in reply to the affdvt. in opposition to motion to transfer.	
Jun. 24-74	Filed plaintiff's affdvt. and notice of motion for a protective order -ret. 7-2-74.	
Jun. 27-74	Filed memo end. on pltfs. motion dated May 24, 1974 transferring action to the EDNY---Motion denied. So ordered, Weinfeld, J. m/n	
Jul. 1-74	Filed deft. Amber Maritime Corp. affdt. of Arthur M. Boal in opposition to pltfs. motion for protective order Rule 26(c) FRCP.	



<u>DATE</u>	<u>PROCEEDINGS</u>
Jun. 28-74	Filed Pltff. Notice to Produce
Nov. 7-74	Filed Deft. Amber Maritime Corp. request for admissions to pltf.
Nov. 13-74	Filed Pltff's Reply to Request for Admissions
Nov. 18-74	Filed deft. Amber Maritime Corp.'s affdvt. and notice of motion to adj. action - ret. 12-20-74
Nov. 15-74	Filed pltfs. answering affdt. of Martin Mulroy
Nov. 29-74	Filed memo end. on deft. Amber Maritime Corp. affdt. dated Nov. 15, 1974 ---The within motion is withdrawn as per attached letter dated Nov. 22, 1974, Weinfeld, J. m/n
Dec. 18-74	Filed Deft. Amber Maritime Corp. answer to plfts. note of issue.
Dec. 16-74	Filed Pltffs. note of issue and statement of readiness.
Mar. 26-75	Filed pltf. ANSWERING affdvt. of attempts to amend its answer HRCL&C
Apr. 10-75	Filed depositions of Capt. Theodore Argyris taken before Dean Diziken. Counsel to the US at Athens, Greece. m/n
Apr. 10-75	PRE-TRIAL CONFERENCE HELD BY Mag. Goittel
Apr. 23-75	Filed consent supplemental pre-trial order--Weinfeld, J.
Apr. 24-75	Filed deft. Amber Maritime Corp. affdt. and notice of motion for an order permitting the deft. to file an amended answer
Apr. 4-75	Filed memo. Endorsed on motion filed 3-24-75. Deft. Amber Maritime's motion to file amended answer is denied--Weinfeld, J. m/n

DATEPROCEEDINGS

Apr. 29-75	Non-Jury trial begun before: Judge Weinfeld
May 30-75	Trial concluded and decision reserved
Jun. 6-75	Filed consented to pre-trial order. So Ordered, Weinfeld, J.
Jun. 6-75	Filed deft. Amber Maritime proposed findings of facts.
Jun. 6-75	Filed pltfs. proposed findings of facts.
Jun. 6-75	Filed defts. trial memorandum.
Jun. 6-75	Filed pltfs. trial brief.
Jun. 6-75	Filed defts. brief.
Jun. 6-75	Filed pltfs. post trial memorandum.
Jun. 6-75	Filed OPINION #42547--Pltf. is entitled to recover the total stipulated amt. of damages \$15,929.60. Weinfeld, J. m/n
Jun. 30-75	Filed Judgment #75,570 Ordered that the pltf. National Starch & Chemical Corp., recover of the deft. Amber Maritime Corp. the sum of Fifteen Thousand Nine Hundred Twenty-Nine & 60/100 (\$15,929.60) dollars with interest thereon at the rate of six per cent from the twentieth day of Nov. 1972, in the amount of Two Thousand Four Hundred Seventy-Eight & No/100 (\$2,478.00 dollars amounting in all to the sum of Eighteen Thousand Four Hundred Seven & 60/100 (\$18,407.60) dollars, together with its costs of action to be taxed by the Clerk of the Court, and that the action against Apollo Shipping Co. is dismissed without costs, no appearance having been entered by said deft. --- Weinfeld, J. Judgment Entered 6-30-75-clerk.
Jul. 2-75	Filed bill of costs on Judgt. #75,570 taxed in the sum of \$44.76. in favor of pltf.



DATE

PROCEEDINGS

Jul. 17-75	Filed Transcript of Record of Proceedings Dated April 29, 30, 1975
Jul. 22-75	Filed appeal bond #S749013 in the amount of \$250.00 by Northwestern National Insurance Company of Milwaukee, Wisconsin for deft. Amber Maritime Corp. for costs on appeal.
Jul. 22-75	Filed deft. Amber Maritime Corp. notice of appeal to the USCA for the Second Circuit from a judgment of the Dist. Court entered on 6-30-75. mail copy to Hill, Ribkins, Carey, Loesberg & O'Brien

COMPLAINT

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

---

NATIONAL STARCH & CHEMICAL CORPORATION,

Plaintiff,

-against-

SS HERMIONE, her engines, boilers, etc.,  
AMBER MARITIME CORP., APOLLO SHIPPING CO.,

Defendants.

---

The plaintiff herein, by their attorneys,  
Hill, Rivkins, Warburton, McGowan and Carey, complaining  
of the above named vessel and defendants, allege upon  
information and belief:

FIRST: This is an admiralty or maritime  
claim within the meaning of Rule 9(h) of the Rules  
of Civil Procedure.

SECOND: At and during all the times here-  
inafter mentioned, plaintiffs had and now have the legal  
status and principal offices and places of business  
stated in Schedule A hereto annexed and by this refer-  
ence made a part hereof.

THIRD: At and during all the times herein-  
after mentioned, defendants had and now have the legal  
status and offices and places of business stated as  
common carriers of merchandise by water for hire, and  
owned, operated, managed, chartered and controlled



the above named vessel which now is or will be within the jurisdiction of this Court during the pendency of this action.

FOURTH: On or about the date and at the port of shipment stated in Schedule A, there was delivered to the vessel and defendants in good order and condition the shipment described in Schedule A, which the said vessel and defendants received, accepted and agreed to transport for certain consideration to the port of destination stated in Schedule A.

FIFTH: Thereafter, the said vessel arrived at the port of destination described in Schedule A, where the cargo was delivered short and/or otherwise damaged.

SIXTH: By reason of the premises, the above named vessel and defendants breached, failed and violated their duties and obligations as common carriers and were otherwise at fault.

SEVENTH: Plaintiff was the shipper, consignee or owner of the shipment as described in Schedule A, and brings this action on its own behalf and, as agent and trustee, on behalf of and for the interest of all parties who may be or become interested in the said shipment, as their respective interests may

ultimately appear, and plaintiff is entitled to maintain this action.

EIGHTH: Plaintiff has duly performed all duties and obligations on its part to be performed.

NINTH: By reason of the premises, plaintiff has sustained damages as nearly as same can now be estimated, no part of which has been paid, although duly demanded, in the amount of \$20,281.68.

W H E R E F O R E, plaintiff prays:

1. That process in due form of law according to the practice of this Court may issue against defendants.

2. That if defendants cannot be found within this District, that all of their property within this District, as shall be described in the affidavit attached hereto, be attached in the sum set forth in this complaint, with interest and costs.

3. That a decree may be entered in favor of plaintiff against defendants for the amount of plaintiff's damages, together with interest and costs.

4. That process in due form of law according to the practice of this Court may issue against the aforesaid named vessel.

5. Plaintiff further prays for such other,



further and different relief as to this Court may  
seem just and proper in the premises.

HILL, RIVKINS, MCGOWAN & CAREY  
Attorneys for Plaintiff

By: s/ Martin B. Mulroy  
Member of the Firm

[Duly ~~filed~~ led by  
Martin B. Mulroy  
on November 12, 1973]

SCHEDULE A - ANNEXED TO COMPLAINT

Plaintiff legal status and place of business:

Plaintiff, National Starch & Chemical Corporation is a corporation organized and existing under and by virtue of the laws of the United States with an office and place of business at 1735 West Front Street, Plainfield, New Jersey,

Defendant legal status and place of business:

Amber Maritime Corp. is a corporation organized and existing under and by virtue of the laws of the United States with an office and place of business in care of Amber Asia Corporation 1615 Northern Blvd., Manhasset, New York.

Apollo Shipping Co. is a corporation organized and existing under and by virtue of the laws of Greece with an office and place of business in care of Atlantis Shipping and Commercial Co. Ltd., Office No. 6, 3rd floor, Odos Fillelinon 9, Piroeus, Greece.

Date of Shipment: November 14, 1972

Port of Shipment: Bangkok

Port of Discharge: Camden

Shipper:

Consignee:

Notify:

Description of Shipment: 221 pallets containing 5525 bags tapioca flour; 199 pallets containing 4975 bags tapioca flour; 221 pallets containing 5525 bags tapioca flour; 381 pallets containing 9525 bags tapioca flour

Nature of Loss or Damage: short-delivery and damage/slackage to above described shipment under bs/1 1, 3, 4 and 6.



ANSWER

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

[ SAME TITLE ]

The defendant, AMBER MARITIME CORP., answering the complaint herein by its attorneys, BOAL, DOTI & LARSEN, respectfully alleges upon information and belief as follows:

FIRST: It denies knowledge or information sufficient to form a belief as to the allegations contained in Paragraph SECOND and SEVENTH of the complaint.

SECOND: It denies each and every allegation contained in paragraphs THIRD and FOURTH of the complaint insofar as those paragraphs refer to the defendant, AMBER MARITIME CORP., and denies knowledge or information sufficient to form a belief insofar as those allegations relate to the other defendants.

THIRD: It denies each and every allegation contained in Paragraphs FIFTH, SIXTH, EIGHTH and NINTH of the complaint.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE, THE DEFENDANT, AMBER MARITIME CORP., ALLEGES:

FOURTH: That if as alleged in the complaint any damage was occasioned to the cargo therein described,

such damage was caused by storms and perils of the sea and/or improper and inadequate packaging and palletization by the shipper and not by any event for which the defendant is responsible or liable.

WHEREFORE, the defendant, AMBER MARITIME CORP., demands that the complaint as to it be dismissed with costs as against the plaintiff and that it be granted such other and further relief as the cause of justice may require.

BOAL, DOTI & LARSEN

By

A Member of the Firm  
Attorneys for Defendant,  
AMBER MARITIME CORP.  
Office & P. O. Address  
225 Broadway  
New York, New York 10007  
233-2500

TO: HILL, RIVKINS, MCGOWAN & CAREY, ESQS.  
Attorneys for Plaintiff  
96 Fulton Street  
New York, New York 10038



INTERROGATORIES NOS. 2 AND 5 ADDRESSED TO THE  
PLAINTIFF AND ANSWERS THERETO, WITH EXCERPT  
FROM THE SURVEY REPORT OF THEODORE HELPRIN

INTERROGATORIES ADDRESSED TO THE PLAINTIFF  
AND ANSWERS  
-----

Interrogatory No. 2: If the named shipper in the bills of lading is not the agent of the plaintiff, state if the plaintiff obtained titles to the bills of lading.

ANSWER: Yes. The bills of lading were endorsed in blank and delivered to plaintiff approximately within 1 or 2 weeks after arrival of the S/S HERMIONE, precise date of the bills of lading and the date of payment for the cargo should be furnished as soon as available.

\* \* \*

Interrogatory No. 5: State for each bill of lading the number of bags that were damaged and the amount of cargo lost because of such damage.

ANSWER: See survey report by Theodore D. Helprin, Inc. dated July 25, 1973.

EXCERPTS FROM SURVEY REPORT:

"Our examinations revealed the shipments to consist of the normal 6 ply kraft paper bags, machine sewn over reinforcing tape at the top and bottom with each bag weighing 100 pounds net.

"The bags were originally stacked on pallets in 6 tiers of 4 bags each leaving an open space in the center in which an additional bag was placed. Each pallet load, therefore, consisted of 25 bags.

"The pallets were satisfactorily constructed of 1"x3" and 2 3/4" x 3" lumber. The palletized units measured 48" x 48" x 48" and were covered with double-faced corrugated fibreboard on the tops and two sides. The other 2 sides were partly covered at the top. Each palletized unit had the bags secured horizontally with two 5/8" plastic straps."

AFFIDAVIT OF MARTIN B. MULROY  
SWORN TO MAY 24, 1974 - IN  
SUPPORT OF MOTION TO TRANSFER

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

[ SAME TITLE ]

STATE OF NEW YORK    )  
                          )  
COUNTY OF NEW YORK ) SS:-

MARTIN B. MULROY, being duly sworn, deposes  
and says:

I am an attorney and member of the firm of  
HILL, RIVKINS, CAREY, LOESBERG & O'BRIEN, attorneys  
for plaintiff herein and I am fully familiar with all  
the pleadings and proceedings heretofore had herein.

This is an action for shortage and damage to  
cargo brought in the name of the consignee who purchased  
the cargo in question from Tapioca Associates, Inc. The  
suit was brought by National Starch and Chemical Corpora-  
tion according to paragraph 7 of the complaint "on its  
own behalf and, as agent and trustee, on behalf of and  
for the interest of all parties who may be or become  
interested in the said shipment ....."

The invoice of sale for each of the four  
bills of lading involved in this suit are attached  
hereto as Exhibit "A" and a letter between seller and



buyer predating the carriage on the defendant vessel under which the plaintiff herein effected the insurance is attached hereto, made a part hereof and marked Exhibit "B".

At a pre-trial conference the attorney for the defendant Amber Maritime Corp., charterer of the carrying vessel advised Judge Tyler of the existence of a suit arising out of the same voyage involving the same cargo before Judge Bartels in the Eastern District of New York.

After talking to the attorney for the plaintiff in that suit deponent was advised that neither he nor his client, Tapioca Associates, Inc. have any objection to the consolidation of the present litigation before this Court with that suit which arose out of the same identical contracts of carriage and in fact involved the same parties, representative capacity aside. The verified complaint in the Eastern District suit with summons is attached hereto, and marked Exhibit 3, the answer of Amber Maritime Corp., is marked Exhibit 4, the amended verified complaint is marked Exhibit 5, and the amended answer to the amended verified complaint is marked Exhibit 6. It is submitted that the effect of the transfer would be in the interest of justice in

avoiding the duplication of testimony, trial time on the part of the burdened Court docket.

WHEREFORE, deponent requests that the plaintiff's motion be granted transferring this action to the United States District Court, Eastern District of New York, for consolidation with the action entitled Tapioca Associates, vs. Amber Maritime Corp., Amber Asia Corporation and Apollo Shipping Corp. and M/V HERMIONE, 73 Civ. 316 (J. Bartels).

s/ Martin B. Mulroy  
MARTIN B. MULROY

[Duly sworn to  
May 24, 1974]



AFFIDAVIT OF ARTHUR M. BOAL  
IN OPPOSITION TO MOTION TO  
TRANSFER

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

[ SAME TITLE ]

STATE OF NEW YORK    )  
                              ) ss.:  
COUNTY OF NEW YORK )

ARTHUR M. BOAL, being duly sworn, deposes  
and says:

I am a member of the firm of Boal, Doti &  
Larsen, attorneys for the defendant AMBER MARITIME  
CORP., and am familiar with all the pleadings and pro-  
ceedings heretofore had in this case.

This is a case for shortage of and damage  
to cargo shipped on the SS HERMIONE under four bills  
of lading. The goods in question were sold by Tapioca  
Associates, Inc. to the plaintiff ex-dock and were  
not owned by the plaintiff prior to delivery by the  
carrier to the person entitled to receive them under  
the bills of lading.

In Paragraph 3 of the amended complaint of  
Tapioca Associates, Inc. against Amber Maritime Corp.,  
Amber Asia Corporation and Apollo Shipping Corp. and  
M.V. HERMIONE, in the United States District Court  
for the Eastern District of New York, it is alleged:

"The plaintiff was the owner of the cargo described below up to the time the cargo described below was picked up by the purchaser, National Starch & Chemical Corporation ("National"), at the dock in Philadelphia, Pennsylvania and Baltimore, Maryland."

It is also alleged in that complaint that part of the cargo was discharged in Philadelphia and part in Baltimore and sought to recover from the carrier the extra cost of transporting the cargo from Baltimore to its destination over what would have been the cost from Philadelphia.

That suit does not involve in any way the damage to cargo. None is claimed. That case has been set for trial by Judge Bartels for Tuesday, August 6th at 10 A.M. The defendant will not be prepared at that time to try the issue of damage to this cargo. The issues in these two cases are entirely separate and distinct and no advantage will be obtained by having them tried at the same time and before the same judge.

It is therefore submitted that the motion to transfer should be denied.

s/ Arthur M. Boal

[Duly sworn to  
May 28, 1974]



REPLY AFFIDAVIT OF MARTIN B. MULROY  
SWORN TO JUNE 20, 1974

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

[ SAME TITLE ]

STATE OF NEW YORK     )  
                              )   SS:-  
COUNTY OF NEW YORK    )

MARTIN B. MULROY, being duly sworn, deposes  
and says:

I am a member of the firm of Hill, Rivkins,  
Carey, Loesberg & O'Brien, attorneys for the plaintiff  
herein and I make this affidavit in reply to the affi-  
davit in opposition to the motion to transfer.

Opposition to the motion is substantively  
based on the plaintiff in the Eastern District action  
being different than the plaintiff in the case before  
this Court. However, this is a difference in form  
only since the plaintiff in the action before this  
Court is a "nominal" plaintiff in whose name the action  
was brought as trustee for the real party of interest,  
and the case could have been as easily brought in the  
name of Tapioca Associates, Inc. or the underwriter.

Plaintiff will be ready for trial on August 6th  
should the motion be granted.

[Duly sworn to  
June 20, 1974]

s/ Martin B. Mulroy  
MARTIN B. MULROY

PARTS OF PRE-TRIAL ORDER

1. The parties agree that the trial of this action should be based upon this Order and upon the pleadings.

2. (b) It is plaintiff's contention that defendant Amber Maritime Corporation were negligent in failing to deliver the commodities described in the four bills of lading as referred to in C above in the same apparent good order and condition as when received at Bangkok and that said defendant thereby breached the terms and conditions of the bill of lading. Plaintiff contends that the bags of tapioca were broken, many were severely torn, and partly or almost entirely empty, contaminated with filth, and short entire bags.

(c) The defendant contends that the plaintiff was not a party to the bills of lading and never owned the bills of lading under which this cargo was carried. It purchased the cargo ex-dock and had no title to the cargo until it took delivery on the dock at Philadelphia and Baltimore. Amber specifically contends:

This tapioca was purchased by National Starch from Tapioca Associates under contracts Nos. 1617A, 1619A and 1620. These contracts provide

"1. No arrival - no sale \* \* \*".

"Except as otherwise provided the usual ex-dock terms are to apply."



Tapioca Associates Inc. filed a suit in the United States District Court for the Eastern District of New York against the M/V HERMIONE, Amber Maritime Corporation, Amber Asia Corporation and Apollo Shipping Corporation in which it alleged that it was the owner of the bills of lading BCD 1, 3, 4 and 6, and that the defendants Amber Maritime Corp. and Amber Asia Corp. had not performed all of the terms of those bills of lading and as a result of their breach of the terms of the bills of lading it had been damaged.

This case was tried before Judge Bartels who stated in his Findings of Fact and Conclusions:

"On September 6, 1972 Amber Asia contracted with Tapioca to transport, on the M/V HERMIONE, approximately 1338 tons of tapioca flour from Thailand to the United States, the terms of delivery being ex dock at either Philadelphia, Pennsylvania, or Camden, New Jersey, at the carrier's option. In turn, Tapioca contracted for the sale of this flour to National Starch & Chemical Company ("National"), a New Jersey corporation with its place of business at Finderne, New Jersey. Under this contract National was required to accept delivery of the flour ex dock in either Philadelphia or Camden and transport it, at its own expense, to Finderne, New Jersey.

\* \* \*

"The contract of carriage entered into by Tapioca and Amber Asia

dated September 6, 1972 provides that the cargo is to be loaded, stowed, carried, discharged, and delivered in accordance with U.S. Law pertaining to the Carriage of Goods by Sea, as in effect at the time.."

Judgment was entered dismissing the complaint which precludes any other suit on the bills of lading BCD 1, 3, 4 and 6.

Amber further contends that National Starch purchased this cargo under contracts Nos. 1617A, 1619A and 1620 under which they got title to the cargo ex-dock.

There was a letter of agreement as to insurance dated August 23, 1972. That provides:

National Starch & Chemical Corporation will bind all risk covered under their open marine and warrisk insurance policy to include American Institute clause from warehouse to warehouse, for the above shipment on declaration at ex-dock value.

In the event of loss due to marine or warrisk peril resulting in non-delivery Tapioca Associates will be paid versus shipping documents.

3. (a) The exhibits which each party expects to offer at the trial are:

Plaintiff: Four (4) invoices dated November 13, 1972.  
Three (3) contracts of sale.  
A. Copy of Check to the order of Tapioca Associates dated November 29, 1972.



- A. Tapioca Associates' letter dated August 23, 1972.

Bills of Lading BCD 1, 3, 4 and 6.

- A. Tapioca Associates' letter dated March 1, 1973.

- A. Theodore D. Helprin, Inc.'s survey report.

Johnson & Higgins' correspondence.

Invoices of John T. Clark & Son of Maryland, Inc.

- A. Tapioca Associates' letters dated December 28, 1972 and January 26, 1973.

- A. FDA Notice of Detention and Hearing.

- A. Delivery receipts.

Delivery orders

- A. Warehouse receipts

- A. Truckers freight bills and bills of lading and delivery receipts.

Stowage plan.

Weather reports.

- A. All exhibits marked in evidence in Tapioca Associates, Inc. versus M.V. HERMIONE, etc., E.D.N.Y. 73 Civ. 316.

Defendant:

- A. The complaint, answer, Findings of Fact and Conclusions of law in the case of Tapioca Associates, Inc. vs. M.V. HERMIONE, Amber Maritime Corporation, Amber Asia Corporation and Apollo Shipping Corp. in the United States District Court for the Eastern District of New York.

Bills of Lading BCD 1, 3, 4 and 6.

The contracts between National Starch and Tapioca Associates 1617A, 1619A and 1620.

Should any party hereafter decide to offer additional exhibits, prompt notice of that fact shall be given to the other party and to the Court by serving and filing a supplemental pre-trial memorandum setting forth the reason why the exhibits was not theretofore identified. No exhibit may be offered at the trial unless identified in a pre-trial memorandum.

7. The issues to be tried by the Court (with the consent and agreement of the parties) are as follows:

- (1) (a) Was the plaintiff a party to the contract under which these goods were transported from Bangkok to Philadelphia and Baltimore?
- (1) (b) Was the plaintiff entitled to maintain this action as the owner of the shipment or as agent and trustee on behalf of and for the interest of all parties who may be interested in the said shipment.
- (2) Was this cargo delivered to the plaintiff by its seller Tapioca Associates, Inc. on the dock in Philadelphia and Baltimore?
- (3) Did the suit by Tapioca Associates against the defendant on these four bills of lading terminate all rights under those bills of lading against the defendant as carrier?



- (4) Does the plaintiff have any cause of action against the defendant because it accepted delivery from its seller on the dock of cargo in a damaged condition?
- (5) Does the plaintiff have any cause of action against the defendant for non-delivery of and damage to any of the cargo.
- (6) Is the defendant relieved of liability by virtue of improper or inadequate palletization by the shipper?
- (7) Is the defendant relieved of liability by virtue of storms and perils of the sea?

EXCERPTS FROM TESTIMONY OF WILLIAM MILLER

Testimony of William Miller, Vice President of Tapioca Associates, Inc., a witness for the Plaintiff/Appellee

\* \* \* \* \*

DIRECT

10

\* \* \* \* \*

Q I show you plaintiff's exhibit 2 and I ask you if you can identify that contract that has been marked in evidence (handing).

A Yes, I can.

Q Now, this is a Tapioca Associates form; is that correct?

A That is correct.

Q Have you, prior to the date of that contract, dealt with National Starch & Chemical on contracts similar to that particular form?

A Yes, we did.

\* \* \* \* \*

11

Q Does the document that you have in your hand represent the entire contract between you and National Starch?

A I don't believe it does.

Q In what way is the contract between you and National Starch different, or did it vary from the contract that you have in your hand?



Miller/Direct

A It did vary, particularly as it applied itself to the marine insurance.

\* \* \* \* \*

MR. MULROY: I would like to have this letter marked for identification, letter of Tapioca Associates.

(Plaintiff's exhibit 7  
marked for identification)

Q I show you a document that has been marked 12 plaintiff's exhibit 7 for identification. Are you familiar with that document (handing)?

A Yes, I am.

Q What is the basis of your familiarity with that document?

A It's a letter issued by our company as an amendment to the contract.

\* \* \* \* \*

Q Would you state to The Court the circumstances under which the amendment was issued?

A Steamship space was a little difficult to obtain in this period of time, and the space that was available 13 seemed to be with little, or, lesser known carriers. Tapioca Associates being primarily a sales organization had little leverage to obtain marine insurance. We advised National Starch of this, and they agreed to bind it.

Miller/Direct

We amended the contract to cover that. This letter does that.

\* \* \* \* \*

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Q Are you familiar with the packing of the cargo that was referred to in the contracts of sale?

A Yes, I am.

Q How is the cargo packed?

A It was packed in multi-wall paper bags and then palletized on wood pallets in cardboard shrouds and steel banded, steel strapped.

Q For what period of time had shipments of this nature been packed in that fashion?

MR. BOAL: I object to that question, unless he knows.

THE COURT: I assume the witness is speaking from personal knowledge. Do you know?

THE WITNESS: Absolutely I know. I observe most of the cargo that gets shipped.

Q I'm sorry, I didn't hear you.

A I know the mode of packing by first hand knowledge, and --

Q For what period of time do you know of the cargo being packed in this fashion?

A For several years prior to this.



Q Have you shipped other cargos with Amber Maritime Corporation that were packed in this fashion?

A Yes, we did.

\* \* \* \* \*

Q Was there any complaint as to the packing in connection with that shipment?

A No.

\* \* \* \* \*

Q In connection with this particular shipment on the Hermione, what was the method by which you handled the bills of lading that were issued by the carrier?

MR. BOAL: Objected to.

THE COURT: Let him state what was done.

Q What was done in connection with the bills of lading that were issued by the carrier?

A At what point in time?

Q Well, when you received the bills of lading what did you do with them?

A Ultimately we surrendered them to the steamship 18 company in return for a delivery order, or, release of the goods. Through a freight forwarding company.

Q And what was the name of the freight forwarding company?



Miller/Direct

A We used two. The vessel discharged in two ports. I believe it was the Masson Company in Baltimore and the Morris Friedman Company, I believe, in Philadelphia.

MR. BOAL: What was that? I couldn't hear that.

MR. MULROY: The Morris Friedman Company in Philadelphia --

THE COURT: The Masson Company in Baltimore and the Morris Friedman Company in Philadelphia.

THE WITNESS: Yes, sir.

Q Did your company give any instructions or have anything to do with the issuance of a delivery order?

MR. BOAL: I object to the question.

THE COURT: I think we ought to get the fact of what was done.

Q What did you tell your freight forwarder to do for you in Philadelphia and in Baltimore?

A To clear the goods for entry into The United States and to issue the delivery order to the National Starch & Chemical Company.

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\* \* \* \* \*

Q Do you know of your own knowledge of the payment, or of any payment having been made by National Starch in connection with these goods to Tapioca Associates?

Miller/Direct

MR. BOAL: That I object to. Payments were made in the regular course, and --

THE COURT: Well, is there any issue about that in this case?

MR. MULROY: I have a copy of the cancelled checks for payment.

THE COURT: Well, show them to Mr. Boal. Why do we spend time on something that really isn't contraverted?

MR. BOAL: This doesn't show what this check is for.

MR. MULROY: I would like to have this document marked for identification.

(Plaintiff's exhibit 8  
marked for identification)

MR. BOAL: What is the date of it?

MR. MULROY: November 29th, 1972.

Q Mr. Miller, I show you a document that has been marked plaintiff's exhibit 8 for identification (handing). Do you know what that document represents? 20

A I believe it represents payment for the complete bill of lading quantities on the Hermione vessel.

Q That total is the total of the four invoices; is that not so?

A I believe that's true.



Miller/Direct

\* \* \* \* \*

MR. MULROY: That's correct, Your Honor.

Q Did you issue any, or, did you receive any debit memorandums from your customer, National Starch, in connection with this cargo that you sold to them charging back any part of the payment?

A No.

\* \* \* \* \*

Q When the Hermione arrived in Philadelphia, did<sup>21</sup> you go down to see the ship?

A Yes, I did.

Q And you boarded the vessel and examined it?

A Yes, I did.

Q Did you look into each of the hatches?

A I looked into all the hatches that were open. I believe they were all open.

Q What did you observe with regard to the condition of the cargo?

A Generally very poor condition in my experience.

Q In what way was it in poor condition?

A The pallets were well jostled and partly adrift, those that I could see.

\* \* \* \* \*

\* \* \* \* \*

Q Well, describe the stevedore pallet to us, please.

A Only that they are considered a re-useable type and not a disposable pallet, and the stringers go through rather than just having little corner posts out of them, and they are made out of at least three quarter inch thick timber which these were.

Q How many bags were stowed on each pallet?

A Twenty-five.

Q And how were they stowed?

A In six layers of four bags each and one bag in the center, wrapped with corrugated cardboard and steel banded. Each bag also was glued to each other.

Q This fibreboard covering was over the top and over two sides, wasn't it?

A Over four sides.

Q Four sides?

A Yes, sir.

Q You are sure about that?

A Yes, sir. To protect the corners. That was the purpose. We wouldn't protect two and leave two unprotected..



Miller/Cross

Q Well, if this fibreboard was only on two sides it wouldn't protect the cargo, would it?

A No. The steel band went completely around all four sides.

Q How many steel bands around it?

A Two.

Q Where were those steel bands?

A Horizontally around the pallet load.

Q Around the pallet, yes, but how far apart were they?

A Approximately a foot and a half.

Q And you say --

THE COURT: The two bands going in the same direction?

THE WITNESS: Both steel bands were going in

25

the same direction.

Q You say there was fibreboard covering on all four sides and on the top?

A Except those that got ripped off in the stowage and handling. They were there originally, yes, sir.

Q Did you see them originally?

A No, we contract for the design and they were there originally...

\* \* \* \* \*

Q Do you know whether you saw any of that cargo of yours in number five, number two or number one in Philadelphia?

A Yes, I did see it.

Q In which one did you see it?

A I recall distinctly five and two. I'm not sure -- I cannot remember whether I saw any cargo in hatch one, because I'm not sure the hatch was open when I was there.

Q The number two was down in the lower hold, wasn't it?

A I don't recall exactly how far down it was, but I could see it. From the deck.

Q According to this plan it was in the lower hold, wasn't it (hanging)?

A According to this plan it was in the lower hold, yes. In hatch two.

Q And in hatch two there was nothing above it, was there?

A I don't see anything on that piece of paper above it, no.

Q When you looked to this cargo you say there were some of the pallets that didn't have fibreboard on



four sides?

A I can't answer that question. I can't recall.

Q Do you recall seeing any with fibreboard on four sides?

A Oh, yes, I believe I did. I saw some that weren't even on their pallet anymore, also. That had completely gone adrift and became broken and damaged. Some of it was quite perfect, also.

Q Where did you see that?

A In hatch five I saw some pallets. I saw some that had been discharged from the vessel that were in the warehouse already.

Q Was that any of yours?

A Yes, it was.

Q And you are sure that all of your cargo was in pallets with fibreboard on four sides and on the top?

A Yes, sir.

Q Did you see any of the cargo at Baltimore?

A No, sir, I didn't.

Q You weren't down to Baltimore?

A No, I didn't go to Baltimore. I went to Philadelphia --

Q Who did you say were the forwarding agent in Baltimore?

A William H. Masson Company.

Q Masson Company. They represented you?

A They represented us, right, for certain functions.

Q What were those functions?

A To clear the goods into The United States and make them available for delivery.

Q By "clear them" you mean clear them through customs?

A Customs, Food & Drug Administration, and so on and so forth.

Q That was so far as your duty as seller of these goods, was it?

A I don't quite understand.

Q It was your duty as owner of these goods to clear them through customs and clear them through The Drug Administrations; is that right?

A We imported the goods into The United States, that's correct.

Q In that respect your forwarding agents acted for you both in Philadelphia and in Baltimore?

A They acted on our instructions.

THE COURT: That would be Friedman and Masson; is that right?

THE WITNESS: Yes, sir.



THE COURT: Masson in Baltimore and Friedman in Philadelphia?

THE WITNESS: Yes, sir.

Q And you sent the bills of lading to them. Did't you?

A Yes, we did.

Q With instructions for them to issue the delivery orders to National Starch for delivery of these goods on the dock; isn't that right?

A Yes, we asked them to issue the delivery order.

\* \* \* \* \*

Q Mr. Miller, the shipper of these goods sent bills of lading through its bank to Tapioca Associates, didn't they?

A Yes, they did.

Q And you picked them up from the bank; is that right?

A Yes, we did.

Q And what did you do with them after you got them from the bank?

A We surrendered them to the steamship company for a delivery order of the goods in due course.

Q I show you these bills of lading which are

marked plaintiff's Exhibit 4. What are the endorsements on the back of those bills of lading (handing)?

A Thai Tapioca, Limited, and Tapioca Associates, Incorporated.

Q Tapioca, Limited was the shipper, wasn't it?

A Thai Tapioca, Limited was the shipper.

Q The shipper, yes. And it was endorsed by Thai Tapioca, Limited, and was endorsed by Tapioca Associates, your company?

THE COURT: Endorsed to Tapioca Associates; is that what you are saying?

MR. BOAL: Endorsed by them. They got it from the bank with one endorsement --

A Yes, they appear to have been endorsed by Tapioca Associates.

Q What name is on that for Tapioca Associates?

A Marjorie A. Whelan.

Q Who is she?

A At that time she was a clerk in the corporation.

Q Did she have authority to sign that endorsement?

A Yes, she did.

Q And Morris Friedman & Co. were your freight agents in Philadelphia?

A In Philadelphia.



Q And they endorsed this and then delivered it to the carrier.

A I presume they did, because the delivery order was issued.

Q Well, your instructions to them were to deliver them to the carrier?

A That's correct.

Q And issue a delivery order to National Starch, pick up the tapioca on the pier.

A Right.

Q Is that correct?

A Yes.

Q Mr. Miller, I would like to ask you whether you agree or disagree with this description of the pallets on the Hermione: Bags were stowed four to a tier, six tiers high, one bag in center on a shipper's wooden pallet; a fibreboard cover was over the top and draped two sides of the bags on the pallet; the fibreboard cover was secured by two metal bands around the periphery generally in the way of the second and fifth tier of bags; two sides of the palletized bags were left exposed; there was no securing of the bags onto the pallet.

Would you say that description was correct, or wrong?

A I would say it's partly correct and partly wrong.

Q In what respects is it correct?

A It's correct in the fact that as I said before a wooden pallet was used, there were twenty-five bags on the pallet. I disagree with the description of the cardboard shrouding being only on two sides, because it was on all four sides.

Q How ere those bags stacked on the pallet?

A Four bags to a tier, just like it said.

Q Were they all stacked in the same direction, or where they criss-crossed?

A No, they were not.

Q Where they criss-crossed?

A Criss-crossed which is the normal way to stack bagged cargo on pallets. Interlocking stacking.

Q Were the bags in any way secured to the pallet?

A Yes, they -- well, they were glued.

Q Glued? How were they glued?

A With glue. They were glued to the pallet and to each other all the way up to make a monolithic block.

THE COURT: I thought you said there were steel bands around them.

THE WITNESS: Well, that was around the exterior



of the pallet load, but they were glued to each other internally.

THE COURT: I see what you mean. Was the bottom layer glued to the floor of the pallet?

THE WITNESS: Yes, sir.

THE COURT: And each tier was --

THE WITNESS: Glued to each other tier. On the flat part of the bags.

THE COURT: All right. If there are no other questions of the witness you may be excused.

MR. MULROY: May I, Your Honour?

THE COURT: Yes.

RE-DIRECT EXAMINATION

BY MR. MULROY:

Q Did Tapioca Associates assert any claim for money damages for non-delivery, or damage occurring to the cargo while the vessel was in the custody carrier against anyone?

\* \* \* \* \*

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Q Did you assert any claim?

A We asserted no claim for good reason.

THE COURT: Strike out the last part, "for good reason."

Q Did Tapioca Associates have any -- run any risk of a financial loss as a result of anything that would happen to this cargo while it was at sea?

A No.

\* \* \* \* \*

EXCERPTS FROM THE TESTIMONY OF NICHOLAS CREMEDAS

\* \* \* \* \*

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Direct

\* \* \* \* \*

Q By whom are you employed?

A National Starch & Chemical Corporation.

Q What is your title with them?

A Purchasing agent.

Q For how long have you been purchasing agent?

A Over twenty years.

Q Did you participate in the negotiations, or arrangements for the purchase of four shipments of tapioca flour carried on the Hermione in September of 1972?

A I did.

Q In connection with this purchase I show you a

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document that has been marked plaintiff's exhibit 7, a letter dated August 23 (handing).

MR. BOAL: What is the date of that?

MR. MULROY: August 23, 1972.

Q Now, this letter was addressed to you; is that correct, sir?

A That's right.

Q And there was a place on that letter for an acceptance?

A Yes.

Q Do you recall if you signed the original or a



copy of that and sent it back?

A Yes, I did.

Q In connection with this acceptance that you signed there is a provision in this letter in the second paragraph, in the event of loss due to marine or war risk perils resulting in non-delivery, Tapioca Associates, Inc., will be paid versus shipping documents; do you see that?

A Yes.

\* \* \* \* \*

Q Under this agreement you were obligated to take out -- cover this cargo by marine and war risk insurance policy; is that correct?

A That's correct.

Q What company did you insure the cargo with?

MR. BOAL: I will object to the question.

Q Did you insure the cargo?

A Yes, I did.

Q Who was your broker?

A Johnson & Higgins.

MR. BOAL: I object to the question.

THE COURT: I will let him answer the question.  
Overruled.

Q Your broker is Johnson & Higgins, and with what company -- I'm sorry.

Did you insure the cargo, did they insure the cargo for you?

A Yes.

Q With what company did they insure the cargo?

A Northwestern National Insurance Company.

\* \* \* \* \*

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Q Mr. Cremedas, did you issue any debit memorandum or receive any refund on this payment?

MR. BOAL: I will object to it.

A On the cargo, no.

\* \* \* \* \*



"Q Please state your name and address.

"A Argyris Theodoros; Nespandelli, Athens, Greece.

"Q Please state your occupation.

"A Master

"Q Please state what licenses you hold as an officer of ships.

"A Master's certificate.

"Q Were you, in September, October and November, 1972, a member of the crew of the M/V Hermione on a voyage from Bangkok, Thailand, to United States Ports?

"A. Yes.

"Q. If you answer the above question in the affirmative please state what position you held.

"A. Master.

"Q. Do you have any personal recollection of the weather conditions which you experienced in the course of that voyage?

"A. Yes.

"Q. If you answer the above question in the affirmative please describe the kinds of weather you experienced during that trip.

"A. Twice weather of 10 Beaufort Scale.

"Q. How many storms did you experience during the course of that voyage?

"A. Two.

"Q. State if you remember the force of the wind during each of the storms experienced on that voyage.

"A. First one 8, second one 10.

"Q. Did you file a protest at your first United States port of call?

"A. Yes, at Searsport.

"Q. If you answer the above question in the affirmative please state if the document attached hereto as exhibit A is a copy of that protest.



"A. Yes.

"Q. Are the statements in that protest, exhibit A, correct?

"A. Yes."

Your Honour, I would like to put in the protest which was attached to the original testimony which would be part of The Court's file.

THE COURT: Where is it?

MR. MULROY: I will proceed, Your Honour, we can put the exhibits in on the conclusion.

"Q. Was this cargo properly stowed at Bangkok?

"A. It was under the supervision of a responsible man from Amber Maritime.

"Q. Could you tell when the cargo was loaded on the ship how the bags were secured within the pallets?

"A. Yes.

"Q. If you answer the above question in the affirmative state how they were secured.

"A. It was a quadrant, square, with a leg at each corner, and the bags were put in.

"Q. Did the bags of tapioca in the pallets shift in the pallets during the course of that voyage?

"A. Maybe.

"Q. If in answer to the above question you

state the bags did shift in the pallets during the course of the voyage, did the shifting cause any damage to the pallets;

If you state that the bags did shift in the pallets during the course of the voyage, did this shifting cause any damage to the bags themselves?

"A. Perhaps.

"Q. Do you recognize the document attached hereto as exhibit B entitled daily noon data?

"A. Yes.

"Q. If you answer the above question in the affirmative please state what it is.

"A. The every day position of the ship with weather conditions during twenty-four hours.

"Q. Based upon your recollections are the statements therein contained correct?

"A. Yes.

"Q. Attached hereto are a group of sheets marked exhibit C. Are these sheets copies of the original log book of the M/V Hermione for the dates specified therein? And if so will you please state in English the weather conditions shown in the log book in the sheets marked exhibit C.

"A. Yes. Wednesday, 27th September, south-



east 3, cloudy, sea slight, visivility good;

"Thursday, 28th September, south-southeast 3-4, fair weather, sea moderate, visibility good;

"Friday, 29th September, southeast 2-3, sea slight, cloudy, visibility good;

"Saturday, 30th September, southeast 3, fair, sea slight, visibility good;

"Sunday, 1 October, southeast 5, fair, sea rough, visibility good;

"Monday, 2 October, Southeast 5, fair, sea rough, visibility good, vessel pitching;

"Tuesday, 3 October, southeast 4-5, cloudy, moderate to rough, visibility good;

"Wednesday, 4 October, southeast 4-5, cloudy, moderate to rough, rolling, visibility good;

"Thursday, 5 October, south-southeast to south-southwest, 6-7, cloudy, sea rough to very rough, rolling and pitching, visibility good;

"Friday, October 6th, southeast 5, cloudy, sea rough, visibility good;

"Saturday, October 7th, southeast 3-5, cloudy, slight to moderate, visibility good;

"Friday, 3 November, south-southwest 4-5, cloudy, visibility moderate;

"Saturday, 4 November, north 6, partly cloudy, sea very rough, visibility good;

"Sunday, 5 November, north 5, cloudy, very rough, visibility good;

"Monday, 6 November, northwest 6-9, cloudy, sea very rough to storm, vessel is suffering from pitching and rolling, reduced speed;

"Tuesday, 7 November, northwest 10, storm;

"Wednesday, 8th November, north-northwest 9, storm. From 8:00 p. m. north 6-7. Weather improved. Increased speed;

"Thursday, 9 November, southeast 6-7, cloudy, very high, rolling and pitching, visibility moderate to poor.

"Q Have you examined the sheets marked exhibit C to refresh your recollection as to weather conditions encountered by the Hermione?

"A Yes.

"Q Are the statements on these sheets from the long book as to weather conditions correct?

"A Yes."

Cross-questions:

"Q Identify by name and employment each person present while you are giving your testimony other



than any employee of The United States or the stenographer and translator employed by The United States Consulate.

"A Andreos Kalagaris, lawyer.

"Q State when you were last contacted by Boal Doti & Larsen prior to giving your testimony.

"A Last may, 1974.

"Q In connection with the loading in Bangkok, Thailand, was there a charterer's representative present?

"A Yes.

"Q What did the charterer's representative do if anything, or, what role did the charterers play, if any, in the loading of the Bangkok cargo of tapioca flour?

"A He supervised the loading.

"Q At what other ports did the chargerer have a representative or surveyor present during the loading, indicating what that representative did at each of these ports?

"A The same representative was in port Pekan, Singapore and back to Bangkok.

"Q Could you identify the stowage plan attached hereto made a part hereof and marked exhibit c?

"A Yes.

"Q On the basis of the stowage plan and your recollection of the voyage from Bangkok state whether

there was overstorage in the loading of the vessel.

"A. That depends on what you mean by overstorage.

"Q. State for the benefit of the Court what the term overstorage means to you.

"A. He took more cargo than is good for the ship to carry.

"Q. Prior to arriving at Philadelphia or Camden to discharge the tapioca flour did you call at Searsport?

"A. Yes.

"Q. Was the Searsport cargo stowed in the same hold as the tapioca flour destined for Camden and Philadelphia?

"A. Yes.

"Q. Was it necessary to cross over the Camden-Philadelphia cargo in order to discharge the Searsport cargo?

"A. In number 3 hold.

"Q. Do you recall what type of equipment was lowered into the holds for discharging of Searsport -- discharging Searsport cargo which passed over the Camden-Philadelphia tapioca flour in order to discharge the Searsport cargo?



"A. Yes. They used forklift and then by derricks out of the ship.

"Q In the course of the operation at Searsport did you observe damage to the tapioca flour?

"A No, except in number 3 hold, part of the cargo fell into the center of number 3 hold over other cargo.

"Q Is it normal to expect storms on a voyage from Bangkok to New York during October-November?

"A Yes.

"Q Would it be usual to experience force 10 on the Beaufort Scale during such storms for eight hours?

"A Yes.

"Q How many times did you make such crossings prior to September, 1972?

"A I crossed the Atlantic as captain four times.

"Q Can you recall wind forces similarly recorded on other voyages as noted on this voyage?

"A Yes. From 8 to 10 Beaufort Scale.

"Q Were you shown the two notes of sea protest by an attorney representing Boal Doti & Larsen prior to coming here today?

"A. Yes.

"Q If any cargo had shifted in stow during the voyage and particularly during the period of time referred to in these sea protests, would you have indicated that event on the particular sea protest?

"A I remember that some shifted which was tobacco, and mentioned it in the sea protest. I made a cable to the charterers for that.

"Q Reviewing the sea protest attached to the direct interrogatories, did you agree that the only cargo noted to have shifted in stow was tobacco and bales and seedlac cargo in bags?

"THE COURT: What kind of cargo in bags?

"MR. MULROY: Seedlac.

"Q Only if your answer to question number 16 of the direct examination was affirmative state the following: Whether this answer is based on your personal observation only.

"A. Myself and chief officer.

"B. When, date and hour, you first learned the bags shifted in the pallets.

"A. I don't know about the tapioca, only about the pallets for tobacco and seedlac.

"C. The number of pallets in each cargo



compartment, the floor space occupied and the height of the stow of this cargo in each cargo compartment.

"A. I don't know about the number of pallets.

"Q. What was stowed on each side of the tapioca in each of the cargo compartments and how high was each such cargo stowed?

"A. Only the tapioca was stowed.

"Q. How was the cargo of baled tobacco in number 3 tweendeck chocked?

"A. Not chocked.

"Q. Was this tobacco improperly chocked for the voyage?

"A. Not chocked.

"Q. Was it a stiff ship?

"A. I don't know what you mean by a stiff.

"Q. Did you compute the GM for this voyage or did you observe the master do so?

"A. It was not necessary.

"Q. When did you commence loading Bangkok cargo?

"A. Roughly 3rd or 4th September.

"Q. Were you personally in attendance during that loading?

"A. The representative made the loading, I

only observed the seaworthiness of the vessel.

"Q Who performed the actual loading of the tapioca?

"A The representative.

"Q Who supervised their work?

"A I supervised only for the seaworthiness as I said before.

"Q How many feet of space was left between the tapioca and the vessel's hull or other cargo in each compartment?

"A Nothing. Only the dunnage was between the tapioca and the ship's hull.

"Q Other than ripped canvas lifeboat covers was there any structural damage to the vessel on this voyage?

"A No."



\* \* \* \* \*

MR. BOAL: I would like to offer in evidence a certified copy of the record in the case of Tapioca Associates, Inc., against Amber Maritime Corporation, Amber Asian Corporation in The United States District Court for The Eastern District of New York.

It consists of the complaint, the answer, finding of facts and conclusions of law of The Court, and the judgment of The Court. It represents an action by Tapioca Associates on these four bills of lading, and this is conclusive as to any rights in Tapioca As-

sociates on those bills of lading which they owned at the time that the cargo was discharged from the ship off of the pier.

I offer this certified copy of this record in evidence.

MR. MULROY: Your Honour, I would like to object to this being received in evidence on the grounds that the plaintiff in this case was not a party to that proceeding and accordingly should not be bound by it. Plaintiff in this case did not get an opportunity to participate in the particular trial or to examine the witnesses, and to offer anything contrary to this. And I think it should not be considered in this case. Just as part of this point, Your Honour, I have the transcript of the particular trial that is being referred to and MR. Boal made a statement during that trial, he said, unless Tapioca has title to it, meaning the cargo, it cannot recover.

He is referring to this trial in which he is attempting to offer this. And The Court, Judge Bartels, said, Well, I don't know about that. If Tapioca -- you mean to say that if National Starch has title to the goods that Tapioca therefore is a third-party? No, I think title has not much to do with it. This is a breach of



contract case. So Judge Bartels --

THE COURT: Well, before you go ahead, what do you say the significance of that is? What was the definitive holding by Judge Bartels in that case? Did it have anything at all to do with the issues in this case?

MR. BOAL: The issue in that case is whether there was a breach of contract of transportation as specified in the bills of lading.

THE COURT: No, your statement according to the brief submitted by the plaintiff here, when they sought to bring your client into the action you opposed it saying that that suit, according to this action, the one out there, does not involve in any way damage to cargo; none is claimed, the issues in these two cases are entirely separate and distinct, and no advantage would be obtained by having it tried at the same time before the same judge.

The issues were different there, were they not? Didn't it relate to the excess payment made for the transportation of the cargo because it docked at a different place than the original point of destination?

MR. BOAL: They sued for breach of contract. they claimed only one item of damage, but there was one cause of action. All items of damage in that cause of

action must be pleaded, must be --

THE COURT: Now, Mr. Boal, would you explain to me how you get away from your own statement here?

MR. BOAL: What statement are you referring to?

THE COURT: The issues in these two cases are entirely separate and distinct. I don't see how you can claim that anything in that case is res judicata as far as this case is concerned.

MR. BOAL: I don't say it's res judicata. I say it's res judicata so far as Tapioca is concerned of any rights they might have under that bill of lading. Because in his request for findings of fact my brother has asked -- said that he is making this case on behalf of Tapioca Associates who were the owners of the cargo at the time these claims had been damaged.

We say the only cause of action here vested in Tapioca Associates, not in National Starch. And Tapioca Associates is precluded because they had their chance in court to assert all the claims that they wanted to assert.

THE COURT: Well, I will let it into the record for whatever value it has, but I don't see that at this point it is pertinent particularly in the light of the position that you took. What was the motion that was



pending there that you opposed, Mr. Boal, in the action before Judge Bartels? I don't have the full record here.

MR. BOAL: The action before Judge Bartels? I don't know of any motion I --

THE COURT: Well, how did you come to make this statement?

MR. MULROY: Your Honour, that was a --

MR. BOAL: That was a district --

MR. MULROY: (continuing) -- that was in this case. He opposed my motion to consolidate this action with the case in The Eastern District.

THE COURT: Oh, is that it?

(Defendant's exhibit A  
received in evidence)

MR. BOAL: The point I make, Your Honour, is that Tapioca Associates cannot split their cause of action. They brought one suit and that ends it so far as they are concerned. And National Starch can't say we are suing on behalf of Tapioca --

THE COURT: Where does National Starch say it is suing on behalf of Tapioca Associates?

MR. BOAL: Mr. Mulroy put that in his request for suggested findings of fact.

THE COURT: Well, proposed findings of fact don't constitute evidence. Well, what else do you have, Mr. Boal?

\* \* \* \* \*



TESTIMONY OF EDWARD HORGER

- 68 -

(In Open Court)

THE COURT: Good morning all.

THE CLERK: National Starch & Chemical Corp.  
versus S. S. Hermione, et al.

MR. MULROY: Plaintiff ready.

MR. BOAL: The defendant is ready.

THE COURT: Call the other case too, please.

THE CLERK: Antonio Fernandez versus American  
President Lines.

MR. SERGI: Plaintiff is ready.

MR. WASNER: Defendant is ready.

THE COURT: All right, I will call that case  
immediately after I finish this one. We will be here  
about fifteen or twenty minutes in this case, then we  
will have the jury come right up.

MR. BOAL: Defendant calls Mr. Horger.

E D W A R D   H O R G E R ,   called as a witness on  
behalf of the defendant, having been first duly sworn  
by the clerk, testified as follows:

DIRECT EXAMINATION

BY MR. BOAL:

Q     Mr. Horger, what is your occupation?

A Marine surveyor.

Q     Where are you located?

A 3500 Gaul Street, Philadelphia, Pennsylvania.

Q In November of 1972 did you examine the cargo in the Hermione in Philadelphia?

A Yes, I did, sir.

Q Was the cargo on the pier or on the ship?

A Portions were on the pier and the remainder in the vessel.

Q How many hatches did you examine on the ship?

A Five.

Q Five? Was some of this cargo palletized?

A Yes, sir, it was.

Q Will you describe the pallets?

A They were wood shipper's pallets containing twenty-five bags. I believe they were hundred pound net weight each. The bags were secured four bags to a tier, six tiers high. The bags were placed around the perimeter of the pallet so that there was a hollow space in the center. One bag was standing on end in the center. There was corrugated fibreboard draped over the top and two sides. The bags were then secured by a metal band laterally, generally in the way of the second and fifth tier of bags.

Q You say there was fibreboard on top and two sides?



A Yes, sir.

Q What about the other sides?

A There was a slight overlap from the top of several inches, but basically the two sides were exposed.

Q Were these bags in any way secured within the pallets?

A There was no unitizing of the bags to the pallets.

Q Would those pallets move with the rolling and pitching of a ship in that condition?

MR. MULROY: Objection.

THE COURT: Why? On what ground do you object?

MR. MULROY: Your Honour, I object on the grounds that --

THE COURT: He is not qualified as an expert; is that it?

MR. MULROY: He is not in a position to say whether it would roll during the pitching of a ship, because he saw the bags on the dock in Philadelphia.

THE COURT: Well, as an expert he may express an opinion.

MR. MULROY: He hasn't been qualified as an expert, Your Honour.

THE COURT: Well, qualify him as an expert then, Mr. Boal.

Q How long have you been examining cargos as a surveyor?

A Ten years, sir.

Q Have you examined much tapioca?

A Yes, sir.

THE COURT: What does your work as a surveyor encompass?

THE WITNESS: We primarily deal in cargo difficulties, working mainly for harterers' or owners' accounts.

THE COURT: Have you had any experience with cargo en route from one port to another, and the impact of sea conditions?

THE WITNESS: I have no firsthand knowledge of the conditions of the cargo during its ocean transit. Only its arrival and discharge condition.

MR. BOAL: Would you permit the question?

THE COURT: Well, the witness said, has just testified, he has no experience of travel conditions I understood his answer; is that right?

THE WITNESS: Firsthand knowledge of the conditions experienced for this particular cargo.

THE COURT: That wasn't what I asked you, though. I think you had better try and qualify him. So



far he is not qualified on his own statement.

Q Was there any room in these pallets for cargo to shift with the rolling and pitching of the ship?

A In so much as the bags are not secured to the pallet and the pallet can assume the angle of the vessel while she is rolling perhaps thirty or forty degrees with six or seven second snaps, it is my opinion that the pallet at that angle there is nothing to keep bags from going adrift of the pallet or moving from the pallet in so much as they are not secured to the pallet.

THE COURT: Wouldn't you have to know how the stow was made up?

THE WITNESS: I would say this, that the bags were not secured to the pallet and it is inevitable that if the pallet were to lean and there were any free space at all that the bags would have to move. I would also note that the bags being stowed on the perimeter of the pallet and a hollow space existing in the center which was to some extent taken by the one bag in the middle which was stowed on end but did not fully absorb all that void area, that it was in effect a hollow pack, so that bags could shift internally.

Q Were any of them protruding from the pallet when you examined them?

A Yes, sir, many were telescoped, the entire six tiers of bags were leaning from the pallet.

Q What effect does a little tapioca have on a bag?

A It's very slippery. It makes a very smooth surface.

Q In other words, it will cut down friction?

A That is my opinion, sir.

Q To what extent were the bags protruding out of the pallets which you saw?

A Some had gone adrift and others were simply telescoped several inches.

Q Did you see any evidence that the bags were damaged in the pallets by shifting or drifting?

A I'm not quite sure I understand, sir.

Q Did you see any evidence of damage to the bags in the pallets which could be caused by shifting or by drifting?

MR. MULROY: I would like to object to this question, Your Honour, on the grounds that there is no evidence of shifting or drifting.

THE COURT: There isn't up to this point.

Q Did you see evidence that these bags had shifted in the palets, and had drifted?



A Yes, sir.

Q Do you have any opinion as to whether that shifting or drifting caused any damage to those bags?

A Yes, sir.

Q What is your opinion?

A It appeared to me as though the rolling, or the pitching of the vessel had created a circumstance where the bags were going adrift, or were telescoping heavily from the pallets. Where they had gone adrift in some instances they were torn and the contents were sifting.

Q Mr. Miller testified here yesterday that these bags were all covered with glue and they formed a solid mass in the pallets. Did you see any evidence of any glue?

A No, sir. There was no glue apparent either in the remaining bags in the vessel or on the bags that I surveyed in the pier shed.

Q What was the condition of the cargo when you examined it in the ship and on the pier?

A On the pier, sir?

Q On the pier first?

A There were many loose bags, many bags were slack, had sifting. Many bags on various pallets were

leaning heavily.

Q In what way were the pallets leaning?

A Evidently the bags had sifted, or shifted slightly on the pallet. Some bags were slack on lower tiers, perhaps the second or third tier, due to sifting of the contents. And it was an uneven stow for the remaining --

Q Was there damage to the pallets caused by the shifting of the bags?

A Damage to the pallets, sir?

Q Yes.

MR. MULROY: Your Honour, I don't think that the witness is qualified to answer that question.

THE COURT: Read the question, please.

(Pending question read)

THE COURT: You are certainly leading, Mr. Boal, I must say that, too. I will take his opinion for whatever value it has.

A You mean to the pallet itself, or --

Q Yes.

A I frankly didn't see much damage to the pallets, sir.

Q You said the pallets were leaning. What do you mean by that?



A I'm sorry, I don't mean the pallets. I meant, to be more specific, the bags were leaning heavily, not the wood pallet itself.

Q The bags were leaning in the pallets, you mean?

A That's right, sir.

Q And that had caused the shifting of the pallets?

A If you are referring to the actual pallet shifting, I don't think there was very much movement of the actual wood pallet. I think it was more movement of the bags on the pallets.

Q Were these pallets squares?

A Yes.

Q Were there posts on the four corners of these pallets?

A No, sir.

Q You had a floor and four posts?

A The pallet was a flat wood pallet.

Q And were there posts on the four corners of the pallet?

A Posts you say, sir?

Q Posts, yes, sir.

A There were no posts.

Q What held up the fibreboard that was covering the top and two sides?

A Just draped over the top and two sides, and metal banded to the bags.

Q Did you see on that pier any pallets that had fibreboard on four sides?

A No, sir, I did not.

Q Have you seen that on other ships?

A I have seen that type of packaging previously, yes, sir.

Q What did you find on the ship?

A That the bags on the pallets were leaning heavily. Some bags had gone adrift, some bags were torn and the contents were sifting.

Q Some bags had gone out of the pallets?

A Yes, sir.

Q Entirely, or just partially?

A Entirely, sir.

Q Had they gone out on the open side?

A That's correct, sir.

Q Was that true in all holds or not?

A Well, the cargo was carried at least the particular bills of lading consigned to National Starch were carried in number 1 'tweendeck, 1 lower hold, 2 lower hold, 5 'tweendeck and 5 lower hold. Now, 1 and 5 'tween-decks were empty on our arrival. Number 1 lower hold, 2 lower hold and 5 lower hold were in the process of dis-



charge. So I can only comment in stow about 1, 2 and 5 lower holds.

MR. BOAL: That is all.

CROSS-EXAMINATION

BY MR. MULROY:

Q Mr. Horger, you testified that you have seen this type of packing before; is that correct?

A Yes, sir.

Q For what period of time have you observed this type of packing? That is, in terms of number of years or number of shipments?

A I suppose several years.

Q Would you say that this type of packing that you observed in connection with shipment was the standard type of packing in connection with shipments of tapioca flour?

A Well, I would --

Q As of that time.

A No, I would not say that, sir. They were alternating at that time out of this -- this particular type of tapioca came out of Bangkok and they were alternating at that time, I don't know whether it was various shippers or whether it was just a change of packaging and we were in an intermediate stage, but they

were alternating between a four-sided pack. By "four-sided" I mean corrugated fibreboard on all four sides and a two-sided pack.

Q Did you examine a shipment on the Al Mansouriah that arrived in Philadelphia approximately the same time on behalf of Amber Marine?

A No, I did not, sir.

Q Do you know of a shipment of tapioca flour on that vessel?

A No, I do not, sir.

Q By whom were you engaged in connection with this survey that you made?

A We were originally contacted by Adams & Porter.

Q What were your instructions?

A To attend on aboard, that they had some shifting of cargo. Originally what had ha-pened, if I may go through this --

Q Go on.

A The vessel had commenced discharge November the 14th, but did not do any cargo discharge because of rain. She commenced discharge on the 15th at 0800. At 1200 the vessel, the longshoremen refused to do any further work because they requested distressed cargo rates.

Q That document you are referring to, what is the



name of that particular document?

A This is my hatch report, sir.

Q May I ask for that hatch report?

A Yes, sir (handing). This top paragraph refers to my actions.

Q Looking through this report I find no reference to a hollow space in the center of the pallet. Do you have any document or not that you made at the time that you made your examination other than that survey report that contains a reference to a hollow space in the center of the pallets?

A I believe if you will review the report and under "cargo packaging" where I say "palletization", I say, "bags stowed four to a tier, six tiers high, one bag in center" which would indicate that that is the area of which I am speaking.

Q And when you say "one bag in center" you mean on the top?

A No, I mean that bag was standing in an upright position, sir, in that void area which was formed by placing the bags on the perimeter.

Q So when this was placed in the center it was placed on the bottom of the pallet; is that correct?

A That's correct, sir.

Q So there was no void space where the bags met the pallet; is that correct?

A Well, sir, that is a square void when you are placing the bags on the perimeter. Whereas the bags are oblong in shape. So if you place an oblong in a square you are still going to have a void space to some extent.

Q Do you know how that bag was placed in the center, if it was placed upright or flat?

A It was placed upright, sir.

Q And what is the basis on which you know this, did you take a pallet apart?

A There were several pallets which were apart in the pier, sir, which were previously discharged.

Q Did you pick up any of these bags yourself by hand on the sound pallets?

A Physically lift them, sir?

Q Yes.

A Not on the sound pallets, no, sir.

Q Did you observe sound pallets in which the bags were square on the pallet with no leaning?

A Yes, sir.

Q Did it come out of the same hold as those pallets that were in a leaning condition?



A Yes, sir.

Q Do I understand you did not pick up any of the bags or physically remove any of the bags from the pallets yourself?

A From the sound pallets, no, sir.

Q Now, from the damaged pallets did you pick up any of the bags?

A I sorted a few, a few bags, just to see the type of packaging and to see what the condition was.

Q And these bags were bags that were loose; is that correct?

A Partially adrift bags, pallets which contained only twenty-two bags or so.

MR. MULROY: I would like to have these photographs marked for identification.

(Plaintiff's exhibit 10  
marked for identification)

Q I show you two photographs and ask if these photographs are representative of the nature of the packing and the shipments that you are describing in your testimony (handing).

A These are representative of some of the bad order bags, or, palletized bags which outturned from this vessel.

Q In connection with the two photographs that you have there do you note the cardboard on the side of one of the pallets covering the entire side exactly as you testified it does? Do you see that in the picture?

A You mean this pallet in the forward part of the picture?

Q Yes. Do you see the cardboard covering one entire side of the pallet?

A Yes, I do, sir.

Q Sir, looking at the picture that you have there does that cardboard that covers one entire side of the pallet also extend down the lateral side?

A It appears to extend down approximately two to three bags, sir.

Q So that the bands that were placed around that pallet would not be on the corners of the bags, but would have been on that cardboard on the corner; is that correct, sir, from the photograph?

A On this particular pallet I would say that is correct, sir.

Q And this was the nature of the packing then, what is indicated in this photograph?

A I would not say it is representative of the entire -- I would also like to submit photographs --



Q Well, I asked, is this representative of the packing of the shipment that you saw?

A Well, I would say, sir, that this drape on the side of this particular pallet was a bit more than the average, sir.

Q On this other photograph that I have here I would like to draw your attention to a piece of cardboard laying on the front center of the photograph.

Did you observe pieces of cardboard like that laying in the hold, or on the dock?

A I'm not sure what this piece of cardboard is, sir. I can't say that I --

Q Well, did you observe --

A No, sir, I did not.

Q So some of the pallets that you observed had cardboard going around as you indicated in this other photograph, but not all of them?

A Not to that extent, sir.

Q And would that indicate that it was ripped off to you?

A In this photograph, sir?

Q On the first photograph. In other words, some of it had the cardboard going all the way around and some of it didn't, and I am asking if that would

indicate that the cardboard was ripped off to you in some manner.

Q If you are asking me where it is open-faced if this was previously corrugated covered, I would say no, sir.

Q No, I am asking where the corners are covered. Were all the corners covered as they were in that picture you are looking at?

A May I refer to my photograph, sir, to see --

Q Can't you answer the question from the photograph I have shown you?

A Well, I think I would prefer to look at mine to see if my notes --

Q If you need something to refresh your recollection, yes, look at it.

A It appears as though all corners were protected by corrugated fibreboard.

Q Did you say all corners were protected ---

A Protected, yes, sir.

Q May I see your photographs?

A Yes, sir (handing).

MR. MULROY: I would offer the two photographs that have been marked for identification as exhibit 10 in evidence.



MR. BOAL: I object to them. There is no evidence that they are photographs of this particular cargo.

THE COURT: The witness has been testifying from them.

MR. MULROY: He testified they were representative of the cargo.

MR. BOAL: I didn't understand him to so testify.

THE COURT: Do you recognize those photographs as pictures that were taken at the time the cargo came in or an inspection was made?

THE WITNESS: They appear to be similar in packaging to what I have sighted aboard the vessel.

THE COURT: Well, what is the basis of your objection?

MR. BOAL: I will withdraw it, Your Honour.

(Plaintiff's exhibit 10  
received in evidence.

MR. MULROY: I would also ask that the seven photographs produced by the witness be marked in evidence.

MR. BOAL: Have the witness identify what they are.

Q Would you identify what these photographs are so that we can have them marked (handing)?

Are they numbered, by the way, in the back?

A Well, I had these reproduced for my own information. If you like I can --

Q Well, would you put a number on the back of each one of them?

THE COURT: Can't we move along? It's beginning to drag a bit.

MR. MULROY: I would just as soon mark them all, Your Honour, if they are representative of the condition of the cargo.

THE WITNESS: Well, I think they are, if you would accept them as that, sir.

MR. MULROY: The witness testifies they are representative of the condition of the cargo.

MR. BOAL: All right.

(Plaintiff's exhibit 11  
received in evidence)

MR. BOAL: I think it would help if you put the blowups in.

THE WITNESS: If you would like, sir.

THE COURT: Do you have blowups of them?

THE WITNESS: These are blowups of some of



them (indicating).

THE COURT: Well, why don't you offer those?

THE WITNESS: Well, they are only of three of them.

MR. MULROY: May the blowups be put in evidence and marked exhibit 12?

(Plaintiff's exhibit 12  
received in evidence)

THE COURT: Proceed, please.

BY MR. MULROY:

Q Have you observed the loading of cargo in a vessel on pallets as being an ordinary, or usual type of practice in connection with various types of cargo?

A Yes, sir.

Q And when this cargo is placed on the vessel in pallets using the pallets more or less as dunnage, would that be what you would consider it? In other words, using a pallet in place of dunnage that is the usual practice, is that not so in shipping circles?

A If you are tight stow you can do that, sir.

Q You say tight stow. By "tight stow" are you referring to using other cargo to secure cargo in place so that it can't roll, is that what you consider a tight stow?

A That's basically correct, sir.

Q If you don't have a tight stow then wouldn't it be necessary to place bracing between the different types of cargo?

A Yes, sir.

Q Now, did you notice any bracing in the holds of this vessel?

A I will be very honest with you. When I attended on board that vessel she had been idle for several days because of this longshormen dispute, and when I went on board I went only on board to speak with the captain and to get a general idea of the extent of this situation.

Now, I did go into the holds with a flashlight because the hatches were not open, they were not working cargo, and these photographs were taken with a flashbulb. I did not note particularly the extent of the dunnaging or its positioning on that date because I was limited, because I was working with artificial light and I had intended to return when they commenced discharge, but they in turn shifted to Baltimore and I never did return, sir.

Q The conditions that you observed in the vessel, would those conditions be consistent with the fact that at a prior port, to wit, Searsport, adjacent cargo was



removed from the vessel and the cargo collapsed because of an absence of shoring after removing a Searsport cargo, would that be consistent with the conditions that you observed?

MR. BOAL: That I object to.

A I would not say that, sir, because the lower holds were not stowed with Searsport cargo and there was extensive shifting in the lower holds.

Q When you saw the vessel the lower hold was not stowed with Searsport cargo; is that correct?

A I believe -- I have to consult my stowage plan, sir, but I believe the lower holds of 1, 2 and 5 only had Philly, Camden and Baltimore, but I would have to re-read that.

Q If the master testified that prior to going to Philadelphia the vessel removed Searsport cargo and after removing here Searsport cargo the remaining tapioca flour collapsed into the void spaces left by the Searsport cargo prior to arriving at Philadelphia, would this be consistent with the conditions that you observed and testified to in Philadelphia?

MR. BOAL: I object to the question, because the master's testimony was confined to number 3 hold.

THE COURT: To number what?

MR. BOAL: Number 3 hold. None of this cargo was in number 3. It was number 1, 2 and 5.

THE COURT: What is the master's testimony; is that right, Mr. Mulroy?

MR. MULROY: The number 3 hold, he is right, Your Honour.

Q Did the condition of the cargo that you observed in Philadelphia, was that condition consistent with his having been run over the cargo at prior ports?

MR. BOAL: I object to that question.

THE COURT: Do you have any proof of that?

MR. MULROY: Yes, Your Honour.

"Q Was the Searsport cargo stowed in the same hold as the tapioca flour destined for Camden and Philadelphia?

"A Yes.

"Q Do you recall what type of equipment was lowered into the holds for discharging Searsport cargo which passed over the Camden-Philadelphia tapioca flour in order to discharge the Searsport cargo?

"A Yes, they used forklift, and then by derricks out of the ship."

THE COURT: All right.



MR. BOAL: In the further answer that was limited to number 3.

MR. MULROY: The collapse was limited to number 3.

THE COURT: Well now, look if we are not going to move along, you know, I brought you in specially, I have got a jury waiting downstairs. I will give you all the time you need, but I am going to bring you back and bring the witness back. He should have been here yesterday. This was supposed to take fifteen minutes now, and I have got a jury waiting downstairs for forty-five minutes.

Q Would you answer the question?

A Would you please restate the question, sir?

Q Was the conditions that you observed in Philadelphia compatible with the cargo having been run over by hi-los in discharging of cargoes at previous ports?

A No. No, sir.

Q You have seen prior shipments packed the same way that outturned without this type of damage, is this true?

A I have seen some shipments come through without damage, sir.

THE COURT: Without what?

Q Packed the same way as this?

THE WITNESS: Without damage and in a similar package, sir.

MR. MULROY: No more questions, sir.

MR. BOAL: If Your Honour please, I would like to read a statement from the survey report of Halperin, which is attached to the answers to interrogatories which were addressed to the plaintiff.

On page 2 --

THE COURT: Whose report is that?

MR. BOAL: Mr. Halperin's.

THE COURT: Who is Mr. Halperin?

MR. BOAL: He was the surveyor for the cargo; and attached to their answers to our interrogatories.

"The pallets were satisfactorily constructed of one inch by three inch and two and a quarter inch by three inch lumber; the palletized units measured forty-eight inches by forty-eight inches by forty-eight inches and were covered with double faced corrugated fibreboard on the tops and two sides; the other two sides were partly covered at the top.

"Each palletized unit had the bags secured horizontally with two five/eighths inch plastic straps."

THE COURT: All right. If there are no other questions of the witness he is excused.



PLAINTIFF'S EXHIBIT 1 - INVOICES

INVOICE NO. 2-1620 A

*Exhibit*

TAPIOCA ASSOCIATES, INC.

52 EAST MEADOW ROAD WILTON, CONNECTICUT 06897

Solo to National Starch and Chemical Corporation  
1755 West Front Street  
Plainfield, New Jersey 07063

DATE November 13, 1972

YOUR ORDER NO. 40-4271

SHIPPED PER m/s HERMIONE FROM Bangkok TO Camden

TERMS Net Cash

DESCRIPTION	WEIGHTS	PRICE	AMOUNT
TARGET BRAND 4271 CAMDEN PRODUCE OF THAILAND	552,500.04 lbs N.S.W.	@ \$6.85 per net 100 lbs. C & F Camden	\$37,846.25
221 pallets		@ \$9.00 per pallet	1,939.00
Less:			\$39,855.25
Contract freight rate - \$37.50 per l.t.			
Actual " " 36.50 per l.t.			
1.00 per l.t.	249.870 l.t.	@ \$1.00 per l.t.	249.87
Insurance		@ \$.425 per \$100	\$39,585.53
			168.24
			\$39,417.14

NOV 13 1972

559,809.62 lbs. Gross  
7,309.58 lbs. Tare  
552,500.04 lbs. Net

PLAINTIFF'S EXHIBIT 2 - CONTRACT OF MARCH 24, 1972

SOLD TO MESSRS. National Starch at  
1735 West Front S  
Plainfield, New J

EXHIBIT  
U. S. Dist. Court  
S. D. of N. Y.

IMPORTANT

Sign two (2) copies and return  
to us at once. Retain original for  
your records.

THROUGH

FOR ACCOUNT OF Tapioca Associates

SHIP TO

New York/P. Ind.

DATE March 24, 1972

ARTICLE

Starche Tapioca

QUANTITY

About 1300 Metric

DESCRIPTION

TAPIoca BRAND - High Viscosity (packages - 1 bags to be marked with four  
last digits of P. O. number)

PACKING

4 ply Kraft - unitized on 48" x 48" new wooden pallets, shrouded and banded  
containing 25 bags each

PRICE

\$6.45 per net 100 lbs. ex dock New York/Philadelphia/Saint John. Price  
based on ocean freight rate of \$37.50 per long ton; any increase or decrease  
for buyer's account.  
\$5.00 per pallet for unitizing

TERMS

Net Cash

POSITION

550 tons May shipment - July arrival

600 tons August shipment - October arrival

Subject availability steamship space

It is understood there may be a viscosity drop slightly below specification  
due to seasonal conditions.

Marine and war risk insurance covered by seller

INSURANCE

WEIGHTS

Net shipped weights

REMARKS

1. No arrival - no sale; replacement by mutual agreement
2. Loading, wharfage and demurrage for account of buyer
3. Responsibilities in event of insect contamination covered by our letter  
of July 6, 1970, and is a condition of this contract.

Except as otherwise provided the usual

ex dock

terms are to apply.

Seller shall not be held responsible for delays in delivery and/or non-delivery resulting from war, war-like actions, riots, strikes,  
government restrictions, embargoes, floods, ice, fires, acts of God and/or any other cause whatsoever that is unavoidable and beyond its  
control.

No claim based upon shortages discoverable by customary inspection shall be recognized unless made in writing within  
fifteen days after arrival of merchandise and then only if 10 percent of original packages and/or containers are still available for  
inspection.

Any controversy or claim arising out of or relating to this agreement, or the performance or breach thereof, shall be settled by  
arbitration in the City of New York in accordance with the rules then obtaining of the American Arbitration Association or the  
Inter American Arbitration Association, unless otherwise specified herein, and judgment upon any award rendered may be entered in  
any court of competent jurisdiction.

Each delivery tendered under this contract is to be considered as a separate transaction and will not affect the balance in any way.

Seller makes no representation or warranty of the suitability or fitness of the merchandise for any particular use.

ACCEPTED NATIONAL STARCH AND CHEMICAL CORPORATION

TAPIoca ASSOCIATES, INC.



PLAINTIFF'S EXHIBIT 5 - DELIVERY ORDER NOVEMBER 21, 1972

MASSO  
for a/c TAPIOCA A

TAPIOCA ASSOCI  
P. O. BOX 392  
WILTON, CONN. 0.

PLAINTIFF  
EXHIBIT  
U. S. Dist. Court  
S. D. of N. Y.

11/21/72

DELIVERY CLERK AT PIER  
DING FOR SHIPMENT

TO DELIVERY CLERK :	SS HEI	LOCUST POINT J.T. CLARK
from port of :	BANGK	3, 4, & 6.
Arrived :	11/18/7	
PLEASE RELEASE TO :	NATIONAL	CHEMICAL CO.
FREE TIME EXPIRES :	5 P.M.	11/27/72

FOR CARRIAGE TO	
(name) :	NATIONAL STARCH AND CHEMICAL CO.
(address) :	
via (route) :	OWN PICK UP

the following merchandise :

No. of Packages	Description of Articles, Special Marks and Exceptions	Weight (Subject to Cor.)
	ORIGINAL DELIVERY ORDER PLACED AT THE PIER	
25,550	BAGS TAPIOCA FLOUR	2,590,839#
	MARKED: 4271	
	CAMDEN-----B/L# 1	
	4269	
	CAMDEN-----B/L# 3	
	4273	
	CAMDEN-----B/L# 4	
	4269	
	CAMDEN-----B/L# 6	
	NO SAMPLE DESIRED BY FOOD AND DRUG ADMINISTRATION-FULLY RELEASED-	
	COLLECT DEMURRAGE CHARGES FROM: RECEIVERS	
	COLLECT DOCK CHARGES FROM: RECEIVERS	

CARRIER PLEASE NOTE :

If pick-up cannot be made, or delivery accomplished promptly,  
please notify us immediately.

Tel. 539-0911

WILLIAM H. MASSON, INC.  
810 KEYSER BUILDING  
BALTIMORE, MD. 21202

Per \_\_\_\_\_  
Import Department

ACCEPT NO PACKAGES THAT DO  
NOT BEAR THE ABOVE MARKS  
AND NUMBERS

NOTE ALL EXCEPTIONS

92a

TRUCKMAN'S COPY

PLAINTIFF'S EXHIBIT 7 - LETTER FROM TAPIOCA ASSOCIATES  
TO NATIONAL STARCH DATED  
AUGUST 23, 1972

August 23, 1972

Mr. N. Cremedas, Purchasing Agent  
National Starch and Chemical Corporation  
1735 West Front Street  
Plainfield, New Jersey 07063

Dear Mr. Cremedas:

m/s HERMIONE - FREIGHT BOOKING  
650 tons - P. O. 40-4269 - Cont. 2-1617 A  
250 tons - P. O. 40-4273 - Cont. 2-1619 A  
250 tons - P. O. 40-4271 - Cont. 2-1620

With your concurrence, we have booked the above mentioned orders for shipment on the m/s HERMIONE. This vessel is scheduled to load about first half September.

It is agreed that the destination of the above mentioned shipments is to be Philadelphia/Camden, and further that National Starch and Chemical Corporation will bind all risk coverage under their open marine and war risk insurance policy to include American Institute Clause from "warehouse to warehouse" for the above shipments upon declaration at the ex dock value. In event of loss due to marine or war risk perils, resulting in non-delivery, Tapioca Associates, Inc. will be paid versus shipping documents.

Tapioca Associates, Inc. will credit National Starch and Chemical Corporation their regular insurance premium of \$.425 per \$100 which is included in the ex dock price.

Copy of booking note with freight of \$36.50 per long ton, palletized, from Amber Maritime Corporation will be forwarded on receipt.

We understand this vessel is of German registry and was built in 1961.

Please signify your agreement to these changes on the above shipments as covered by referred to contracts.

Very truly yours,

*Harry F. Dolan, Jr.*  
Harry F. Dolan, Jr.

ACCEPTED:

*N. Cremedas*  
National Starch and Chemical Corporation



PLAINTIFF'S EXHIBIT 8 - CHECK

<p>CHECK NO. <b>M3069</b></p> <p>DATE <b>11/8</b></p> <p>ORDER OF <b>WILTON CONN 06892</b></p>	<p><b>U. S. Dist. Court S. D. of N. Y.</b></p> <p><i>8</i></p> <p><i>1/1</i></p>	<p><b>CHEMICAL CORPORATION</b> N.Y. 10017</p> <p><b>MORGAN GUARANTY TRUST COMPANY OF NEW YORK</b></p> <p>PAY TO THE ORDER OF <b>****175,261.36</b></p> <p><b>PAID</b></p> <p><b>MORGAN GUARANTY TRUST COMPANY</b></p> <p><b>NEW YORK</b></p>
--	--	--

⑈00030694⑈ ⑆0210⑈0023⑆ 220 99 004⑈ ⑈0017526136⑈

1-480

ANY BANK OR TRUST CO.

1-23

972

BROWN BROTHERS & CO.

1-480

0/K

FOR DEPOSIT ONLY

Brown Brothers & Co.

1010 AVENUE OF THE AMERICAS

TRISTAR ASSOCIATES, INC.

DEFENDANTS' EXHIBIT "A" - PROCEEDINGS IN CASE OF  
TAPIOCA ASSOCIATES INC.  
V. AMBER MARITIME CORP.  
IN THE EASTERN DISTRICT  
OF NEW YORK

[ REPRODUCED HEREIN AT PAGES 96a TO 118a . ]



DEFENDANTS' EXHIBIT "A"

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

FILED  
IN CLERK'S OFFICE  
U. S. DISTRICT COURT E.D. N.Y.

TAPIOCA ASSOCIATES, INC.,

FEB 4 1975

Plaintiff,

TIME A.M. ....

- against -

P.M. ....

JUDGMENT

AMBER MARITIME CORP., AMBER ASIA  
CORP. and APOLLO SHIPPING CORP.,  
and M.V. HERMIONE,

73 C 316

Defendants.

FILED

A memorandum and order, constituting the court's findings of fact and conclusion of law, of the Honorable John R. Bartels, United States District Judge, having been filed on January 31, 1975, awarding judgment to the defendants, it is

ORDERED and ADJUDGED that plaintiff, Tapioca Associates, Inc., take nothing of the defendants, Amber Maritime Corp., Amber Asia Corp., and Apollo Shipping Corp., and M.V. Hermione.

Dated: Brooklyn, New York  
February 3, 1975

*Lewis Orgel*

Clerk

24

FILED	AMBER COPY
DATED	4/2 1975
LEWIS ORGEL	
<i>[Signature]</i>	

DEFENDANTS' EXHIBIT "A"

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

BARTELS, J.

-----X  
TAPIOCA ASSOCIATES, INC.,

73C

316

Plaintiff,

VERIFIED  
COMPLAINT

- against -

M.V. HERMIONE, her engines,  
boilers, etc.,

- and as list -

AMBER MARITIME CORP., AMBER  
ASIA CORPORATION and APOLLO  
SHIPPING CORP.,

Defendants.  
-----X

Plaintiff, Tapioca Associates, Inc., by its  
attorneys, Haight, Gardner, Poor & Havens, for its  
complaint against Amber Maritime Corp., Amber Asia  
Corporation and Apollo Shipping Corp. and the M.V. HERMIONE  
respectfully  
alleges, upon information and belief, as follows:

1. This is a case of admiralty and maritime  
jurisdiction within the meaning of Rule 9(h) of the  
Federal Rules of Civil Procedure.
2. At all times hereinafter mentioned, the  
plaintiff was and still is a corporation organized and  
existing under and pursuant to the law of Connecticut  
with an office and place of business in Wilton, Connecti-  
cut.
3. At all times hereinafter mentioned, the  
defendant, Amber Maritime Corp., was and still is a  
corporation organized and existing under and pursuant  
to the laws of the State of New York with an office and



DEFENDANTS' EXHIBIT "A"

place of business located at 1615 Northern Boulevard, Manhasset, Long Island, New York.

4. The defendant described in the preceding paragraph is a common carrier of merchandise by water for hire and owned, operated, managed, chartered and/or otherwise controlled the vessel Hermione as a carrier of merchandise by water for hire.

5. At all times hereinafter mentioned, the defendant, Amber Asia Corporation, was and still is a corporation organized and existing under and pursuant to the laws of the State of New York with an office and place of business located at 1615 Northern Boulevard, Manhasset, Long Island, New York.

6. The defendant described in the preceding paragraph is a common carrier of merchandise by water for hire and owned, operated, managed, chartered and/or otherwise controlled the vessel Hermione as a carrier of merchandise by water for hire.

7. At all times hereinafter mentioned, the defendant, Apollo Shipping Corp., was and still is a corporation organized and existing under the laws of the Kingdom of Greece with an office and place of business located in Piraeus, Greece.

8. The defendant described in the preceding paragraph is a common carrier of merchandise by water for hire and owned, operated, managed, chartered and/or controlled the vessel Hermione as a carrier of merchandise by water for hire.

DEFENDANTS' EXHIBIT "A"

9. On or about September 9, 1972, there was loaded on the m/v. Hermione approximately 1022 pallets of bagged tapioca at Bangkok which the defendants agreed to carry from Bangkok to Camden, New Jersey under and pursuant to bills of lading BCD 1, 3, 4 and 6.

10. Subsequently, the defendants delivered part of the shipment to Philadelphia and part to Baltimore, not to Camden, New Jersey, in contravention of the terms of the bill of lading described in paragraph 9 of this complaint.

11. As a result of this breach of contract, the plaintiff incurred a freight differential payment, additional freight forwarding charges and other expenses for which the defendants are responsible.

12. Plaintiff has performed all obligations resting upon it under the terms of the bill of lading and all contracts existing between the plaintiff and the defendants.

13. As a result of defendants' breach, there is due and owing from the defendants \$10,000, no part of which has been paid, although duly demanded.

WHEREFORE, plaintiff prays:

1. That process in due form of law according to the practice of this Court in causes of Admiralty and Maritime jurisdiction may issue against the said defendants citing them to appear and answer on oath all and singular the matters aforesaid.



DEFENDANTS' EXHIBIT "A"

2. That process in due form of law according to the practice of this Honorable Court in causes of Admiralty and Maritime jurisdiction issue against the said HERMIONE, her engines, boilers, etc., and that all persons claiming any right, title or interest in said steamship may be cited to appear and answer on oath all and singular the matters aforesaid and that the said steamship may be condemned and sold to pay the demands as aforesaid with interest and costs.

3. That the Court will order, adjudge and decree the said defendants and the HERMIONE to pay to your plaintiff the damages suffered by it, together with interest thereon, and its costs and disbursements.

4. That your plaintiff have such other and further relief as in law and justice it may be entitled to receive.

Witness my hand and the seal of the Court at the City of New York this 19th day of March, 1925.

By

HAIGHT, GARDNER, POOR & HAVENS

Attorneys for Plaintiff  
One State Street Plaza  
New York, New York 10004

A TRUE COPY  
ATTEST

DATED 4/2 1925

LEWIS ORGEL

BY *[Signature]* CLERK  
DEPUTY CLERK

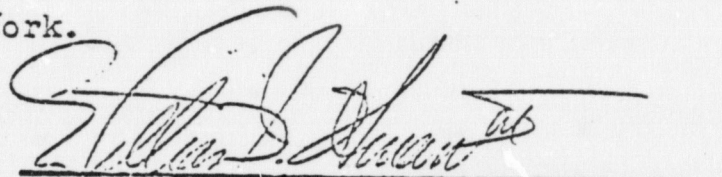
DEFENDANTS' EXHIBIT "A"

STATE OF NEW YORK )  
COUNTY OF NEW YORK ) ss.:

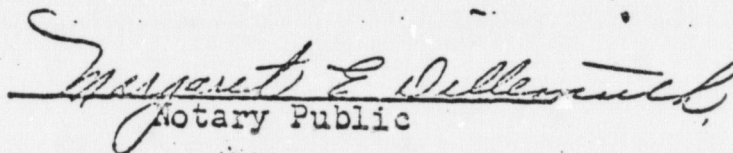
WILLIAM J. HONAN III, being duly sworn, deposes and says:

I am associated with the firm of Haight, Gardner, Poor & Havens, attorneys for the plaintiff herein. I have read the foregoing Complaint and know the contents thereof, and the same is true to the best of my knowledge, information and belief. The sources of my knowledge and information are communications received from the plaintiff and its agents and an examination of the papers relating to the matter in suit.

The reason why this certification is not made by the plaintiff is that said plaintiff is a foreign corporation, none of whose officers is within this district or within the City of New York.

  
\_\_\_\_\_  
William J. Honan III

Sworn to before me this  
5th day of March, 1973.

  
\_\_\_\_\_  
Notary Public

MARGARET E. DILLEMUTH  
Notary Public, State of New York  
No. 41-0959500  
Qualified in Queens County  
Cert. filed with New York Co. Clerk  
Term Expires March 30, 1973



DEFENDANTS' EXHIBIT "A"

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

FILED  
IN CLERK'S OFFICE  
U.S. DISTRICT COURT E.D. N.Y.  
★ APR 11 1973 ★

-----x  
TAPIOCA ASSOCIATES, INC.,

Plaintiff,

-against-

AMBER MARITIME CORP., AMBER ASIA  
CORPORATION and APOLLO SHIPPING  
CORP., and M.V. HERMIONE,

Defendants  
-----x

ANSWER OF AMBER  
ASIA CORPORATION

73 Civ.316

The defendant, AMBER ASIA CORPORATION, answering the complaint herein by its attorneys, BOAL, DOTI & LARSEN, respectfully alleges on information and belief as follows:

FIRST: It denies knowledge or information sufficient to form a belief as to the allegations in Paragraphs SECOND, FIFTH, SIXTH, SEVENTH and EIGHTH of the complaint contained.

SECOND: It denies each and every allegation in Paragraphs ELEVENTH, TWELFTH and THIRTEENTH of the complaint contained.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE,  
THE DEFENDANT AMBER ASIA CORPORATION ALLEGES

THIRD: That it was unable to discharge the cargo of the plaintiff at the port of Philadelphia, of which Camden, New Jersey is a part, because of a labor dispute and refusal of the longshoremen to discharge the cargo, which necessitated carrying that cargo to Baltimore where it was discharged and trans-shipped to the plaintiff.

DEFENDANTS' EXHIBIT "A"

WHEREFORE, the defendant AMBER ASIA CORPORATION demands that the complaint as to it be dismissed with costs against the plaintiff, and for such other and further relief as the justice of the cause may require.

BOAL, DOTI & LARSEN

By

*Andrew M. Boal*  
Member of the Firm

Attorneys for AMBER ASIA CORPORATION  
Office & P.O. Address  
225 Broadway  
New York, N.Y. 10007 (233-2500)

TO: HAIGHT, GARDNER, POOR & HAVENS, ESQS.,  
Attorneys for Plaintiff  
1 State Street Plaza  
New York, N.Y. 10004

A TRUE COPY	
ATTEST	
DATED	4/2 1975
LEWIS ORGEL	
BY	<i>L. Orgel</i> CLERK
DEPUTY CLERK	



DEFENDANTS' EXHIBIT "A"

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

FILED  
U.S. DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

MAR 30 1973

TAPIOCA ASSOCIATES, INC.,

Plaintiff,

TIME 1:14 P.M.

-against-

73 Civ. 316

AMBER MARITIME CORP., AMBER ASIA  
CORPORATION and APOLLO SHIPPING  
CORP., and M.V. HERMIONE,

ANSWER OF AMBER  
MARITIME CORP.

Defendants

The defendant AMBER MARITIME CORP., answering the complaint herein by its attorneys, BOAL, DOTI & LARSEN, respectfully alleges on information and belief as follows:

FIRST: It denies knowledge or information sufficient to form a belief as to the allegations in Paragraphs SECOND, FIFTH, SIXTH, SEVENTH and EIGHTH of the complaint contained.

SECOND: It denies each and every allegation in Paragraphs ELEVENTH, TWELFTH and THIRTEENTH of the complaint contained.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE, THE DEFENDANT AMBER MARITIME CORP. ALLEGES

THIRD: That it was unable to discharge the cargo of the plaintiff at the Port of Philadelphia, of which Camden, New Jersey is a part, because of a labor dispute and refusal of the longshoremen to discharge the cargo, which necessitated carrying that cargo to Baltimore where it was discharged and trans-shipped to the plaintiff.

DEFENDANTS' EXHIBIT "A"

WHEREFORE, the defendant AMBER MARITIME CORP.  
demands that the complaint as to it be dismissed with costs  
against the plaintiff, and for such other and further relief  
as the justice of the cause may require.

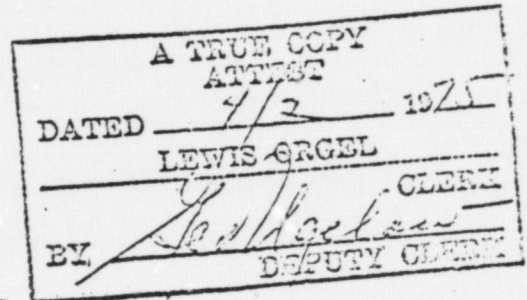
ECAL, DOTI & LARSEN

By

*Robert M. Boal*  
Member of the Firm

Attorneys for AMBER MARITIME CORP.  
Office & Post Office Address  
225 Broadway  
New York, N.Y. 10007 (233-2500)

TO: HAIGHT, GARDNER, POOR & HAVENS, ESQS.,  
Attorneys for Plaintiff  
1 State Street  
New York, N.Y. 10004





DEFENDANTS' EXHIBIT "A"

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

FILED  
CLERK'S OFFICE  
U.S. DISTRICT COURT E.D. N.Y.

JAN 31 1975

TAPIOCA ASSOCIATES, INC.,

Plaintiff,

TIME A.M. ....  
P.M. ....

- against -

73 C 316

AMBER MARITIME CORP., AMBER ASIA  
CORP. and APOLLO SHIPPING CORP.,  
and M. V. HERMIONE,

NOTED

Defendants.

Appearances:

HAIGHT, GARDNER, POOR & HAVENS, Esqs.  
Attorneys for Plaintiff

By: WILLIAM J. HONAN III, Esq.  
Of Counsel

BOAL, DOTI & LARSEN, Esqs.  
Attorneys for Defendants Amber Maritime Corp.  
and Amber Asia Corp.

By: ARTHUR M. BOAL, Esq.  
Of Counsel

BARTELS, J.

In this admiralty action plaintiff, Tapioca Associates, Inc. ("Tapioca"), seeks damages of \$6,860.85 for the misdelivery of tapioca flour by the defendant, Amber Maritime Corp. ("Amber Maritime"). The plaintiff is a

DEFENDANTS' EXHIBIT "A"

Connecticut corporation engaged in the importing of starch products, and including primarily tapioca products, from Thailand into the United States. The defendant, Amber Asia Corp. ("Amber Asia"), is a New York corporation operating as a time-charter shipping company and is the wholly owned subsidiary of the defendant Amber Maritime, also a New York corporation. Jurisdiction is based on 28 U.S.C. § 1333.

On September 6, 1972 Amber Asia contracted with Tapioca to transport, on the M/V Hermione, approximately 1338 tons of tapioca flour from Thailand to the United States, the terms of delivery being ex dock at either Philadelphia, Pennsylvania, or Camden, New Jersey, at the carrier's option. In turn, Tapioca contracted for the sale of this flour to National Starch & Chemical Company ("National"), a New Jersey corporation with its place of business at FINDERNE, New Jersey. Under this contract National was required to accept delivery of the flour ex dock in either Philadelphia or Camden and transport it, at its own expense, to FINDERNE, New Jersey. Prior thereto Amber Maritime contracted with Luckenbach Steamship Co. ("Luckenbach"), a stevedoring company, to unload the M/V Hermione at a fixed rate per ton.



DEFENDANTS' EXHIBIT "A"

Luckenbach is a member of the Philadelphia Marine Trade Association ("PMTA"), an organization of all stevedoring companies operating in the Port of Philadelphia and its vicinity, which organization entered into a collective bargaining agreement with the International Longshoremen's Association ("Union") covering the employment of all longshoremen in the Port of Philadelphia and its vicinity. As a member of PMTA, Luckenbach is bound by both the terms of the agreement and by the charter, by-laws, and rules of the PMTA. Because of the collective bargaining agreement between the PMTA and the Union, Amber Maritime was compelled to contract with Luckenbach, or some other stevedoring company, to unload the M/V Hermione.

The M/V Hermione arrived at Philadelphia on November 14, 1972 and pursuant to the aforementioned contract six gangs hired by Luckenbach began unloading the tapioca flour at 8:00 A.M. on November 15, 1972. At approximately 1:30 P.M. on November 15, 1972 the longshoremen in hatch #5 while unloading the M/V Hermione demanded distress pay and stopped working because the cargo in that hatch, as claimed by them, had badly shifted during

DEFENDANTS' EXHIBIT "A"

the voyage. In the case of such labor disputes, if the employer and the employees fail to agree on a settlement, Section 28 of the collective bargaining agreement <sup>1/</sup> provides that either side may submit the matter to a Grievance Committee composed of two delegates from the Union and two delegates from the PMTA. If in turn this Grievance Committee fails to agree on a settlement then either side may refer the dispute to the impartial arbitrator, previously selected under the terms of Section 28. <sup>2/</sup> A PMTA regulation provides, in part, as follows:

"Once a dispute has been referred to the Association it shall be handled by the Association which shall bring such actions or proceedings as the Association deems desirable, and no such dispute shall be withdrawn or settled unilaterally by the member involved without the prior knowledge and approval of the Association. Any member who violates this provision likewise shall be subject to the penalties provided in Article IV, Section 8 of the By-Laws."

In this case the Grievance Committee failed to agree on a settlement with regard to the dispute in hatch #5 and, accordingly, on November 15 the dispute was referred to the arbitrator who, after viewing the entire ship, orally awarded four hours of distress pay to the longshoremen in



DEFENDANTS' EXHIBIT "A"

in hatch #5. Thereupon, the longshoremen in hatch #5 returned to work at approximately 4:00 P.M. on that day. At no time during this dispute did any of the workers in the other four hatches of the M/V Hermione stop working or demand distress pay. At 5:00 P.M. all of the men on the ship quit working for the day but one gang remained and worked the cargo in hatch #2 for an additional five hours during the night so that by the next morning approximately one-third of the tapioca on board the M/V Hermione had been unloaded.

On the morning of November 16, 1972 however, the longshoremen for the entire ship refused to further unload unless they all received distress pay for unloading, including back pay for November 15. Luckenbach immediately met with the Union delegates and all orally agreed that the longshoremen's claim for distress pay for the entire ship had been settled by the arbitrator's oral decision on the previous day and that the men were not entitled to the distress pay they were demanding. After this conclusion, the Union delegates attempted to persuade them to return to work but the men refused. These attempts having failed, Amber Maritime authorized Luckenbach to pay the workers the amount demanded for unloading the entire ship. The PMTA,

DEFENDANTS' EXHIBIT "A"

however, advised Lucke back that the matter had already been submitted to the Grievance Committee and decided by the arbitrator on the previous day and that any effort to unilaterally settle the dispute by paying the longshoremen the distress pay demanded was expressly forbidden by the PMTA regulation. Accordingly, payment was not made to the longshoremen on November 16 and, therefore, on November 17 the men, again rehired, again refused to work without the demanded distress pay. Faced with this frustration, the MV Hermione, on November 17, at approximately 3:30 P.M. sailed from Philadelphia for Baltimore, its next port of call, arriving there the next day. At Baltimore, a port outside of the jurisdiction of the PMTA, Amber Maritime, on November 18, 1972, paid distress pay to the longshoremen there who then unloaded the remaining two-thirds of the tapioca flour. This caused National to transport the tapioca flour from Baltimore to Funderne instead of from Philadelphia to Funderne, and the additional trucking charges of \$6,860.85 incurred by National was charged against Tapioca by debiting that amount against money that it owed to Tapioca. Tapioca is seeking damages in the amount of \$6,860.85.



DEFENDANTS' EXHIBIT "A"

Discussion

The contract of carriage entered into by Tapioca and Amber Asia dated September 6, 1972 provides that the "[c]argo is to be loaded, stowed, carried, discharged, and delivered in accordance with U.S. Law pertaining to the Carriage of goods by sea, as in effect at the time."

The relevant section of the Carriage of Goods by Sea Act is 46 U.S.C. § 1304(4) which provides that:

"Any deviation in saving or attempting to save life or property at sea, or any reasonable deviation shall not be deemed to be an infringement or breach of this chapter or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom: Provided, however, That if the deviation is for the purpose of loading or unloading cargo or passengers it shall, prima facie, be regarded as unreasonable."

It is well established that the overcarriage of cargo beyond the agreed port of destination and the delivery of that cargo to a port not contracted for is a deviation within the meaning of 46 U.S.C. § 1304(4). Surrendra (Overseas) Private, Ltd. v. S.S. Hellenic Hero, 213 F.Supp. 97 (S.D.N.Y.), aff'd, 324 F.2d 955 (2d Cir. 1963); United Nations Children's Fund v. S/S Nordstern, 251 F.Supp. 833 (S.D.N.Y. 1965). The

DEFENDANTS' EXHIBIT "A"

carrier, however, is not liable for damages resulting from all deviations but only damages resulting from unreasonable ones. When the deviation is for the purpose of unloading cargo, as in the present case, that deviation is prima facie unreasonable and the burden of proof is shifted to the carrier. Surrendra (Overseas) Private, Ltd. v. S.S. Hellenic Hero, *supra*. See also Atlantic Mutual Insurance Co. v. Poseidon Schiffahrt, 313 F.2d 872 (7th Cir.), *cert. denied*, 375 U.S. 819 (1963). The test of determining whether the deviation was reasonable is the test of how a prudent man would have acted in the situation, bearing in mind all of the circumstances existing at the time, including the terms of the contract and the interests of all parties concerned. American Cyanamid Co. v. Booth S.S. Co., 99 F.Supp. 232, 237 (S.D.N.Y. 1951), *aff'd*, 195 F.2d 529 (2d Cir. 1952); Surrendra (Overseas) Private, Ltd. v. S.S. Hellenic Hero, *supra* at 101-02; The San Giuseppe, 122 F.2d 579, 584-85 (4th Cir. 1941).

It should also be noted that 46 U.S.C. § 1304(2)(j) provides that the carrier shall not be liable for damage resulting from strikes, lockouts, or other stoppages or restraints of labor although the carrier is not relieved of



DEFENDANTS' EXHIBIT "A"

liability for its own acts. Thus, if the carrier can show that the deviation was caused by a strike or other work stoppage without it having otherwise acted unreasonably in light of the circumstances then it will be relieved of liability. Hirsch Lumber Co. v. Weyerhaeuser Steamship Co., 233 F.2d 791 (2d Cir. 1956). Amber Maritime was at all times willing to pay the longshoremen the amount demanded but were instructed by Luckenbach that this was impossible because it would constitute a unilateral settlement forbidden by the PMTA regulation since the dispute had been submitted to the grievance procedure and had been settled on the previous day. Luckenbach, the Union, and the PMTA had orally agreed that there was no second dispute on November 16 and that the matter had properly been submitted to the grievance procedure on November 15 and had been settled by an oral arbitrator's award denying the distress pay demanded. Under the Union rules, since this particular group of longshoremen had been hired by Luckenbach for unloading the M/V Hermione no other group could be hired for this purpose. When the longshoremen resorted to this "wildcat strike" Amber Maritime had no alternative means for unloading the vessel at Philadelphia.

DEFENDANTS' EXHIBIT "A"

Forty (40) days after the arbitrator's oral award and after the tapioca was unloaded at Baltimore the arbitrator belatedly submitted a written award dated December 23, 1972 which did not represent his oral conclusions but instead was watered down and indicated that although he inspected the bags of tapioca flour "throughout the ship" the only dispute presented to and decided by him was that concerning the conditions in hatch #5. Had this been the award and the understanding of the parties on November 15, which we find it was not, Luckenbach's advice to Amber Maritime that there could be no unilateral settlement on November 16 would have been erroneous. In view of the impossibility of engaging longshoremen to unload the M/V Hermione at Philadelphia without fault on Amber Maritime's part, we cannot find that Amber Maritime acted unreasonably in ordering the M/V Hermione to Baltimore to unload the remaining tapioca flour. The reason for the incomplete discharge of the M/V Hermione at Philadelphia was the longshoremen's unreasonable and unauthorized refusal to work, a matter completely out of the control of Amber Maritime, Luckenbach, or the PMTA.



DEFENDANTS' EXHIBIT "A"

The above shall constitute the court's findings of fact and conclusions of law pursuant to 28 U.S.C. Rule 52 of the Federal Rules of Civil Procedure.

Therefore, judgment is entered for the defendant.

Dated: Brooklyn, New York  
January 31, 1975

*Valerie R. Bartels*  
\_\_\_\_\_  
U. S. D. J.

A TRUE COPY	
ATTEST	
DATED	4/2 1975
LEWIS ORGEL	
BY	<i>[Signature]</i> CLERK
DEPUTY CLERK	

DEFENDANTS' EXHIBIT "A"

Footnotes

1/ The pertinent portions provide:

"28. Grievance Procedure: All disputes and grievances of any kind or nature whatsoever arising under the terms and conditions of this agreement and all questions involving the interpretation of this agreement other than any disputes or grievances arising under the terms and conditions of Paragraph 14(d) hereof, shall be referred to a Grievance Committee, which shall consist of two members selected by the Employers and two members selected by the Union. Either party in connection with any dispute or grievance where visual observation may be helpful in the resolution of the dispute or grievance may request that the joint Grievance Committee meet at job site. Either party may also request that the Arbitrator selected in accordance with the provisions hereinafter set forth appear at job site where a visual observation would aid in resolving the dispute or grievance, and the Arbitrator shall appear where possible at the same time that the Joint Grievance Committee appears at the job site, at which time in the event of a disagreement in the Grievance Committee, either party may request the Arbitrator to render an immediate decision at job site. Should the Grievance Committee be unable to resolve the issue submitted and should neither party request an immediate decision from the Arbitrator, then the grievance or dispute shall be submitted to a Joint Grievance Panel consisting of three representatives of the Association and three representatives of the Union.



DEFENDANTS' EXHIBIT "A"

Footnotes (continued)

2/ Section 28 of the collective bargaining agreement provides that the arbitrator

"shall be selected to serve for a period of one year from a panel of five arbitrators to be submitted by the American Arbitration Association. From the panel of five, each side shall alternately strike two names each, and the person whose name remains shall be the Arbitrator. The Arbitrator thus selected shall conduct his hearings and procedures in accordance with the Rules of the American Arbitration Association, except that he shall be obliged to render his decision within forty-eight (48) hours of the conclusion of his hearings or procedures."

OPINION OF THE COURT

EDWARD WEINFELD, D.J.

Plaintiff, National Starch & Chemical Corporation, the purchaser of 25,550 bags of tapioca flour shipped from Bangkok aboard the SS Hermione, brings this action against the defendant, Amber Maritime Corp., the time charterer of the vessel, to recover for cargo damage and nondelivery of a portion of the shipment.

Thai Tapioca, Ltd. of Bangkok there delivered to the vessel the merchandise, for which four clean bills of lading were issued by the defendant to the order of Thai Tapioca, which endorsed them to an affiliate, Tapioca Associates. Long prior to the shipment, on March 24, 1972, Tapioca Associates agreed to sell the merchandise to the plaintiff, ex dock. On August 23, 1972, the contract between Tapioca Associates and plaintiff was modified by a writing which provided that National Starch & Chemical Corporation was to secure "risk coverage under [its] open marine and war risk insurance policy . . . for the above shipments upon declaration at the ex dock value." Their arrangement further provided: "In event of loss due to marine or war risk perils, resulting in non-delivery,



Tapioca Association, Inc. will be paid versus shipping documents."

On arrival of the goods in the United States in November 1972 they were outturned at two ports, Philadelphia and Baltimore. Tapioca Associates endorsed the bills of lading to its forwarding agents, who surrendered them to the carrier, together with an order to deliver the merchandise to National Starch & Chemical Corporation. It is not disputed that a portion of the cargo was damaged and also that there was nondelivery of another portion. The parties have stipulated as to the damages for these items. What is at issue is plaintiff's right to recover the damages. The defendant contends that plaintiff was not the owner or holder of the bills of lading at any time, and was not the owner of the tapioca flour at the time it is claimed it was damaged, and accordingly is not entitled to recover.

While it is true that the bills of lading were not formally endorsed or assigned to plaintiff, it is clear that at all times, even before the issuance of the bills of lading, plaintiff, as the purchaser of the yet

to be delivered shipment, was the beneficial owner thereof. This is underscored by the August 23 letter agreement between plaintiff, as purchaser, and Tapioca Association, as seller of the shipment. The terms of that agreement provided that plaintiff was to be obligated for the full purchase price regardless of the condition of the goods upon delivery, plaintiff was to bear the risk of any damage to the goods during transit, and plaintiff, not the seller (as usually is the case in an ex dock sale), was to insure against that risk. Under this arrangement, even if plaintiff was not the formal holder of legal title, it was at least the equitable or beneficial owner and is entitled to maintain the action against the carrier for the loss sustained.<sup>(1)</sup>

Firestone Plantations Co. v. Pan Atlantic S.S. Corporation,<sup>(2)</sup> relied upon by defendant, is distinguishable. There the court did dismiss a cargo damage action brought by a purchaser, which the court noted was not an assignee

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(1) See Elia Salzman Tobacco Co. v. SS Mermacwind, 371 F.2d 537, 539-40 (2d Cir. 1967); M.W. Zack Metal Co. v. The S.S. Birmingham City, 291 F.2d 451, 453 (2d Cir. 1961).

(2) 77 F. Supp. 401 (S.D.N.Y. 1948).



of the bills of lading. But in that case the plaintiff-purchaser had agreed to purchase all crude rubber or latex that another party, a governmental agency with responsibility for acquiring and disposing of all rubber imports, purchased from the initial seller. The plaintiff purchased the rubber "by independent transaction" through invoices dated over thirty days after delivery to the dock. The court expressly noted that plaintiff did not acquire any rights in the cargo while it was in transit and explained its holding:

"The transaction being ex-dock, I think the purchaser made its bargain for the crude rubber in the condition in which it was at that place. If it had suffered damage while on the ship, presumably the price to be paid would have been adjusted by negotiation so as to allow for the determination then present."<sup>(3)</sup>

In the instant case, as explained above, the plaintiff made its bargain for the goods as they were when shipped, obligated itself to pay its seller the agreed upon price regardless of any damage suffered in transit, and assumed the risk of any loss due to damage in transit.

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(3) Id. at 402.

Insofar as the defendant claims that plaintiff was not the owner of the cargo, its only legitimate concern is that in the event it is found liable, it is not called upon to pay damages twice for the same loss. There is no danger of double recovery in this case since Tapioca Associates upon this trial expressly disavowed any claim for loss in connection with the cargo. Moreover, Tapioca Associates, in a suit in the Eastern District of New York referred to hereafter, did not include any such claim. Under all the circumstances, the defendant cannot defeat plaintiff's claim by contending that only Tapioca may assert such a claim.<sup>(4)</sup>

The defendant makes a further contention that plaintiff is barred from recovery in this action by reason of a judgment entered in an action brought in the Eastern District Court by Tapioca Associates against the defendant herein, the carrier, to which action plaintiff here was not a party, to recover for increased trucking charges made necessary when the cargo was unloaded at a part other than that originally designated. This plea

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(4) See *Elia Salzman Tobacco Co. v. S.S. Mormacwind*, 371 F.2d 537, 540 (2d Cir. 1967).



must fail in the light of defendant's own position in opposing consolidation of this action with the Eastern District action. The defendant expressly acknowledged that "[t]hat suit [the Eastern District action] does not involve in any way cargo damage . . . . The issue in these two cases are entirely separate and distinct and no advantage will be obtained by having them tried at the same time and before the same Judge."

Plaintiff established a prima facie case of liability by showing receipt of the goods by the defendant carrier in good condition, as evidenced by the clean bills of lading,<sup>(5)</sup> and a combination of nondelivery and delivery in a damaged condition.<sup>(6)</sup> The defendant bears the burden of showing that the damage was due to one of the "excepted causes" under the Carriage of Goods by Sea Act ("COCSA").<sup>(7)</sup> In this case the defendant contends that the damage was caused by "perils of the sea"<sup>(8)</sup> or

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(5) 46 U.S.C. § 1303(4).

(6) E.g., Demsey & Associates v. S.S. Sea Star, 461 F.2d 1009, 1014 (2d Cir. 1972).

(7) Id. at 1015.

(8) 46 U.S.C. § 1304 (2)(c).

acts or omissions of the shipper or its agent<sup>(9)</sup> -- namely, inadequate packaging.

The only evidence with respect to weather conditions established that the vessel encountered two storms, but that such storms would normally be expected on the voyage and the wind force during these storms was not unusual. Defendant has not demonstrated that any condition encountered by the vessel to a "peril of the sea."<sup>(10)</sup>

The defense of inadequate packaging does not affect plaintiff's claim of nondelivery; it only relates to the claim for damage to delivered goods. Plaintiff's and defendant's witnesses differed as to whether the palletized tapioca was covered on the top and all four sides with fiberboard, whether there were vertical posts at the four corners of the pallet, and whether the bags of tapioca were glued to each other and to the floor of the pallet. Photographs admitted into evidence support the defendant's position that two sides of most pallets

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(9) 46 U.S.C. § 1304(2)(i).

(10) See, e.g., R.T. Jones Lumber Co. v. Roen S.S. Co., 270 F.2d 456, 458 (2d Cir. 1959).



were substantially exposed, although all edges were protected by fiberboard. But even accepting this fact, and assuming that the pallets did not have posts at each corner and that the bags were not glued in any way, it does not follow that the packaging was inadequate. The defendant's witness, a marine surveyor, testified that shippers of tapioca at the time alternated between a four sided package and a two-sided package, and that he had seen other shipments packed the same way that outturned without damage. There was a lack of competent proof that the manner of packing was the cause of the damage.

Plaintiff is entitled to recover the total stipulated amount of damages, \$15,929.60.

Dated: New York, N.Y.  
June 6, 1975

EDWARD WEINFELD  
United States District Judge

JUDGMENT APPEALED FROM

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

[ SAME TITLE ]

This action came on for trial before the Court, Honorable Edward Weinfeld, District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered and filed in Court under Opinion No. 42547 on June 6, 1975;

IT IS ORDERED AND JUDGED that the plaintiff, National Starch & Chemical corporation, recover of the defendant, Amber Maritime Corp., the sum of FIFTEEN THOUSAND NINE HUNDRED TWENTY-NINE & 60/100 (\$15,929.60) DOLLARS with interest thereon at the rate of six per cent from the twentieth day of November, 1972, in the amount of TWO THOUSAND FOUR HUNDRED SEVENTY-EIGHT & NO/100 (\$2,478.00) DOLLARS, amounting in all to the sum of EIGHTEEN THOUSAND FOUR HUNDRED SEVEN & 60/100 (\$18,407.60) DOLLARS, together with its costs of action to be taxed by the clerk of the court; and

IT IS FURTHER ORDERED AND ADJUDGED that the action against Apollo Shipping Co. be dismissed without costs, no appearance having been entered by



the said defendant.

Dated at New York, New York this 24th day of June, 1975.

s/ Edward Weinfeld  
U. S. D. J.

JUDGMENT ENTERED - 6/30/75

s/ Raymond F. Burghardt  
Clerk





SERVICE OF <sup>1 copy</sup> COPIES OF THE WITHIN

Appendix  
IS HEREBY ADMITTED.

COPY RECEIVED

DATED:

SEP 10 1975

WILLIAMS, CAREY, LOESBERG & O'BRIEN

Attorney for

